

REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

2870 F

OF

THE STATE OF MISSOURI.

HORATIO M. JONES,
REPORTER.

VOL. XXVIII.

ST. LOUIS:
GEORGE KNAPP & CO., PUBLISHERS.
1859.

UNIV. OF MICH. LAW LIBRARY



Entered according to Act of Congress, in the year 1859, by

GEORGE KNAPP & CO.,

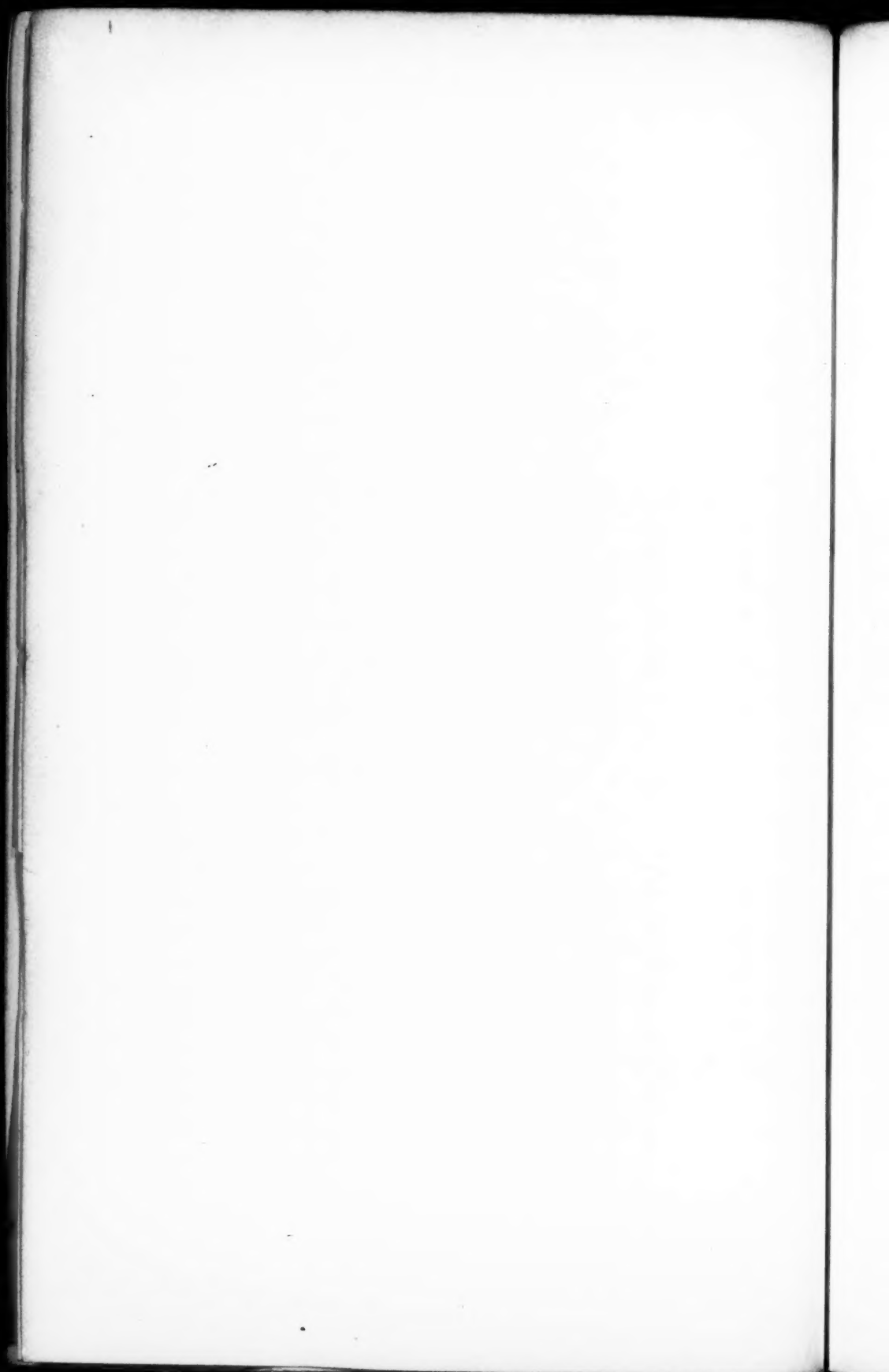
In the Clerk's office of the District Court of the Eastern District of Missouri.

JUDGES OF THE SUPREME COURT OF THE STATE OF
MISSOURI.

HON. WILLIAM SCOTT,

HON. WILLIAM B. NAPTON,

HON. JOHN C. RICHARDSON.



LIST OF CASES REPORTED.

A

	Page
Adams v. Darby & Barksdale.....	162
Ambrose, Basye v.....	39
Ames v. Orme	381
Anderson, Welch v.....	293
Andrews, The State v.....	19
Andrews, The State v.....	14
Andrews, The State v.....	17
Annis v. Bigney.....	247
Anthony v. Ray.....	109
Ashburn v. Ayres.....	75
Atkisson v. Steamboat Castle Garden..	125
Ayres, Ashburn v.....	75

B

Backster v. Hall	593
Ballentine v. Pratt	106
Barada, Chouquette v.	491
Barrett v. Evans.....	331
Barrett, Ham v.	388
Barry, Garnier v.	438
Bascom, Miller v.....	352
Basye v. Ambrose	39
Beattie v. Lett.....	596
Beaupied v. Jennings.....	254
Bennett v. Pound.....	598
Boggs v. Caldwell County.....	586
Bernard v. Callaway County Court.....	37
Best, West v.....	551
Bigney, Annis v.	247
Billingsley's Adm'r v. Bunce	547
Blackmore v. Boardman.....	420
Blanchard, Milburn v.....	523
Blumenthal, Waugh v.	462
Boardman, Blackmore v.	420
Bocka v. Nuella	180

	Page
Bogy, Gibson v.	478
Bohn v. Devlin.....	319
Bowlin v. Furman.....	427
Boyle v. Hardy.....	390
Bradley v. Halloway.....	150
Brainard, Cline & Jamison v.	341
Bray v. Thatcher.....	129
Bredow v. Mutual Savings Institution	181
Brewster v. Link.....	147
Brooks, Stewart v.....	62
Bryan v. Miller.....	32
Bryan, Welch v.....	30
Buffington, Harris v.....	53
Bunce, Billingsley's Adm'r v.	547
Burke's Adm'rx v. Walroud.....	591
Bussmeyer, Paston v.	330

C

Cairns, Cowden v.....	471
Caldwell County, Boggs v.	586
Callaway County Court, Bernard v.	37
Carpenter, Milburn v.....	523
Carpenter, Williams v.....	453
Carson v. Ely.....	378
Cason v. Cason.....	47
Castello v. St. Louis Circuit Court.....	259
Castello, St. Louis, Alton and Chicago Railroad Co. v.....	379
Castle Garden, Steamboat, Atkisson v.....	125
Chiles, Irwin v.	576
Chouquette v. Barada.....	491
Chouteau v. Magenist.....	187
Chrisman, Dickerson v.	135
City of Boonville, Willis v.....	543
City of Memphis, Steamboat, v. Matthews.....	248
City of St. Louis, Robinson v.	488
Climmer v. Wallace.....	556
Cline & Jamison v. Brainard.....	341
Cloud v. Ivie.....	578
Cobb, Hunt v.....	198
Coffee's Adm'rx v. Crouch ..	106
Cole, Prince v.	486
Commonwealth Insurance Co., McAllister v.	214
Conran v. Sellow.....	320
Cowden v. Cairns.....	471
Coy, Dunnica v.....	525
Cravens v. Faulconer.....	19
Cook v. Davis.....	94
Crouch, Coffee's Adm'rx v.	106
Cunningham v. Steamboat Low Water.....	338

LIST OF CASES REPORTED.

vii

D

	Page
Darby & Barksdale, Adams v.....	162
Davis, Crook v.	94
Davis v. Farmer.....	54
Deimler, Dulle v.....	583
Dermody v. Steamboat Maria Denning	284
Devlin, Bohn v.	319
Dickerson v. Chrisman.....	135
Duke, Hamlin v.....	166
Dulle v. Deimler	583
Dunnica v. Coy.....	525

E

Early, Neiman v.	475
Eddy, Moies v.	382
Ely, Carson v.....	378
Evans, Barrett v.	331

F

Farmer, Davis v.	54
Farrington v. McDonald.....	581
Fatchell v. St. Louis & Iron Mountain Railroad Co.	178
Faulconer, Cravens v.....	19
Felton, Witman v.	601
Frederick, Tucker v.....	574
Fulton, Hamilton v.....	359
Furman, Bowlin v.....	427

G

Gardner, State v.....	90
Garnier v. Barry	438
Gibson v. Bogy.....	478
Gillespie v. Gillespie.....	598
Gilliam, Long v.....	560
Gillinwaters v. Gillinwaters.....	60
Goff v. Mulholland.....	397
Grant v. Steamboat Maria Denning	280, 284
Gregg v. Robbins.....	347
Gutzweiler v. Lachman	434

H

Hall v. Webb.....	408
Hall, Backster v.	593
Halloway, Bradley v.	150

	Page
Ham v. Barrett.....	388
Hamilton v. Fulton	359
Hamilton v. Wright's Adm'r	199
Hamlin v. Duke	166
Hannibal & St. Joseph Railroad Co., Mooney v.	570
Hardesty v. Newby	567
Hardin, Woodboat, Lancaster v.	351
Hardy, Boyle v.	390
Hardy, Milburn v.	514
Harney v. Scott.....	333
Harris v. Buffington.....	53
Harrison's Adm'r v. Hastings	346
Hastings, Harrison's Adm'r v.	346
Hawkins, The State to use of Bank of Missouri, v.	366
Hight v. Robbins	168
Hill v. Martin.....	78
Hill v. Sturgeon & Rawlings.....	323
Hodges v. Torrey.....	99
Hogan, Milburn v.	523
Hohenthal v. Watson	360
Holmes, Wiley v.	286
Hortiz, Milburn v.	523
Houser, The State v.	233
Hunt v. Cobb.....	198

I

Irwin v. Chiles	576
Ivie, Cloud v.	578

J

Jackson, Kerr v.	316
Jackson, McManus v.	56
Jennings, Beaupied v.	254
Johnson, Kelly v.	249
Jones, Miles v.	87

K

Karr v. Jackson	316
Kellogg, Whittelsey v.	404
Kelly v. Johnson	249
Kennett v. Plummer	142
Kyte v. Plemmons.....	104

L

Labarge v. Renshaw	363
Lachman, Gutzweiler v.	434
Ladew, Lucas v.	342

LIST OF CASES REPORTED.

ix

	Page
Lamb, The State v.....	218
Lancaster v. Woodboat Hardin	351
Lett, Beattie v.	596
Link, Brewster v.	147
Long v. Gilliam.....	560
Lucas v. Ladew.....	342
Lusk v. Lusk.....	90
Lynch v. Morrow's Adm'r	357
Lynch, Russell v.....	312

M

McAllister v. Commonwealth Insurance Co.	214
McAllister v. Pennsylvania Insurance Co.....	214
McAshan, Powell v.	70
McCamant, Patterson v.....	210
McClellan, Riggins v.....	23
McClure, Milburn v.....	523
McConnell, St. John's Adm'r v.	387
McCune, St. Louis University v.....	481
McDonald, Farrington v.....	581
McKee v. Phoenix Insurance Co.	383
McManus v. Jackson.....	56
McPheeters v. Merimac Bridge Co.....	465
Magenis, Chouteau v.	187
Magwire v. Marks	193
Maria Denning, Steamboat, Dermody v.	284
Maria Denning, Steamboat, Grant v.....	280, 284
Marks, Magwire v.	193
Martin, Hill v.....	78
Martin, The State v.....	530
Martin, Northcraft v.....	469
Matthews, Steamboat City of Memphis v.....	248
Merimac Bridge Co., McPheeters v.....	465
Milburn v. Blanchard	523
Milburn v. Carpenter	523
Milburn v. Hardy	514
Milburn v. Hogan.....	523
Milburn v. Hortiz.....	523
Milburn v. McClure.....	523
Miles v. Jones	87
Miller v. Bascom	352
Miller, Bryan v.	32
Miller v. Mitchell.....	304
Mitchell, Miller v.....	304
Mitchell, The State v.	562
Moies v. Eddy.....	382
Moies, Steamboat Keystone v.....	243
Mooney v. Hannibal & St. Joseph Railroad Co.....	570

	Page
Montgomery, The State v.	594
Montgomery, Young v.	604
Morris v. Morris.....	114
Morrow's Adm'r, Lynch v.	357
Mulholland, Goff v.	397
Mutual Savings Institution, Bredow v.	181

N

Neiman v. Early.....	475
Nelson, The State v.	13
Newby, Hardesty v.	567
Northcraft v. Martin.....	469
Nuella, Bocka v.	180

O

O'Brien v. Perry	500
Orme, Ames v.	381

P

Palmer, Sone v.	539
Paston v. Bussmeyer.....	330
Patterson v. McCamant.....	210
Pelletier, Reed v.	173
Pennsylvania Insurance Co., McAllister v.	214
Perry, O'Brien v.	500
Phelps County Court, Wood v.	119
Phoenix Insurance Co., McKee v.	383
Pilkington v. Trigg.....	95
Plemmons, Keyte v.	104
Plummer, Kennett v.	142
Pound, Bennett v.	598
Powell v. McAshan.....	70
Pratt, Ballentine v.	106
Prince v. Cole.....	486
Peters, The State v.	241

R

Rainey v. Smizer.....	310
Ray, Anthony v.	109
Ray v. Stobbs.....	35
Reed v. Pelletier.....	173
Renick & Peterson v. Robbins.....	339
Renshaw, Labarge v.	363
Ridgley v. Stillwell.....	400
Riggins v. McClellan	23
Risley, St. Louis Public Schools v.	415

LIST OF CASES REPORTED.

x1

	Page
Robbins, Gregg v.	347
Robbins, Hight v.	168
Robbins, Renick & Peterson v.	339
Robinson v. City of St. Louis.	478
Russell v. Lynch.	312

S

St. Charles Western Plank Road Co., Shepherd v.	373
St. John's Adm'r v. McConnell.	387
St. Louis, City of, Robinson v.	488
St. Louis, Alton & Chicago Railroad Co. v. Castello.	379
St. Louis Circuit Court, Castello v.	259
St. Louis & Iron Mountain Railroad Co., Fatchell v.	178
St. Louis Public Schools v. Risley.	415
St. Louis University v. McCune.	481
Sanger, The State, to use of Bank of Missouri, v.	314
Scott, Harney v.	333
Sellew, Conran v.	320
Shepherd v. St. Charles Western Plank Road Co.	373
Shipman, Willoughby v.	50
Smith, Young v.	65
Smizer, Rainey v.	310
Sone v. Palmer.	549
Squires, Wood v.	523
State v. Andrews.	17
State v. Andrews.	14
State v. Andrews.	19
State v. Gardner.	90
State v. Houser.	233
State v. Lamb.	218
State v. Martin.	530
State v. Mitchell.	562
State v. Montgomery.	594
State v. Nelson.	13
State v. Peters.	241
State v. Welch.	600
State v. Wells.	565
State, to use of Bank of Missouri, v. Hawkins.	366
State, to use of Bank of Missouri v. Sanger.	314
Steamboat Castle Garden, Atkisson v.	125
Steamboat City of Memphis v. Matthews.	248
Steamboat Indiana, Syme v.	335
Steamboat Keystone v. Moles.	243
Steamboat Low Water, Cunningham v.	338
Steamboat Maria Denning, Dermody v.	284
Steamboat Maria Denning, Grant v.	280, 284
Stewart v. Brooks.	62
Stillwell, Ridgley v.	400

	Page
Stillwell v. Temple	156
Stobbs, Ray v.	35
Sturgeon & Rawlings, Hill v.	323
Syme v. Steamboat Indiana	335

T

Taylor, Winston v.	82
Temple, Stillwell v.	156
Thatcher, Bray v.	129
Thornton v. Thornton	74
Torrey, Hodges v.	99
Trigg, Pilkington v.	95
Tucker v. Frederick	574

W

Wallace, Climer v.	556
Walrond, Burke's Adm'rx v.	591
Watson, Hohenthal v.	360
Watson v. Watson	300
Waugh v. Blumenthal	462
Weaver, Winkelmaier v.	358
Webb, Hall v.	408
Welch v. Anderson	293
Welch v. Bryan	30
Welch, The State v.	600
Wells, The State v.	565
West v. Best	551
Whittelsey v. Kellogg	404
Wiley v. Holmes	286
Williams v. Carpenter	453
Willis v. City of Boonville	543
Willoughby v. Shipman	50
Winkelmaier v. Weaver	358
Winston v. Taylor	82
Witman v. Felton	601
Wood v. Phelps County Court	119
Wood v. Squires	528
Woodboat Hardin, Lancaster v.	351
Wright's Administrator, Hamilton v.	199

Y

Young v. Montgomery	604
Young v. Smith	65

CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT

OF

THE STATE OF MISSOURI,

JANUARY TERM, 1859, AT JEFFERSON CITY.

[CONTINUED FROM VOL. XXVII.]

THE STATE, Appellant, v. NELSON *et al.*, Respondents.

1. A justice of a county court is not authorized to let to bail a person indicted for a bailable offence unless the indictment is pending in his county.

Appeal from St. Clair Circuit Court.

Ewing, (attorney general,) for the State.

Wright, for respondents.

I. The recognizance is void and the demurrer was properly sustained. The indictment was for a felony and was pending in the St. Clair circuit court, and a justice of the county court of Dallas county had no right to let the prisoner to bail. (State v. Ramsey, 23 Mo. 327.)

RICHARDSON, Judge, delivered the opinion of the court.

The defendant Nelson was indicted in the circuit court of St. Charles county for a felonious assault. The writ was issued to the sheriff of Dallas county, where the defendant

State v. Andrews.

was arrested and let to bail by a justice of the county court of the latter county.

A recognizance is void if not taken by a competent court or officer ; (26 Mo. 213 ;) and the only question in this case is whether a justice of the county court can let to bail a defendant indicted for a bailable offence unless the indictment is pending in his county. The statute provides (R. C. 1855, p. 1179, § 33) that "where the indictment is for a bailable offence, the defendant may be let to bail by the court in which such indictment is pending, or, if such court be not sitting, by the judge thereof, or by any judge or justice of the county court of the county in which the indictment is pending." "Where the indictment is for a misdemeanor the sheriff may himself admit the defendant to bail," &c., (§ 34,) but "no court or officer other than those specified in the last two sections shall let to bail any person indicted for any offence." (§ 35.) In our opinion the recognizance was void and the demurrer was properly sustained to the *scire facias*.

Judge Scott concurring, the judgment will be affirmed. Judge Napton absent.

THE STATE, Respondent, v. ANDREWS, Appellant.

1. The act regulating dram-shops, approved December 13, 1855, (R. C. 1855, p. 683) and the act to tax and license merchants, approved December 11, 1855 (R. C. 1855, p. 1077, § 22,) did not affect the validity of an unexpired grocer's license granted previous to May 1, 1856.
2. The revised code of 1855 repealed the third section of the act of March 25, 1845, (R. C. 1845, p. 542) ; consequently a grocer, under an unexpired license granted previous to May 1, 1856, might permit intoxicating liquor sold by him after May 1, 1856, to be drank at a place under his control.

Appeal from Polk Circuit Court.

Wright, for appellant.

- I. The court erred in permitting the State to give evidence

of a selling in less quantity than a quart and by the drink. (State v. Arbogast, 24 Mo. 363.)

II. The court gave improper instructions on the part of the State and refused proper instructions asked by the defendant. There was no law at the time the indictment was found, nor at the time the defendant sold the liquor by the quart, prohibiting the seller from permitting it to be drank at a place under his control.

Ewing, (attorney general,) for the State.

I. Evidence of sale in less quantities than a quart was properly admitted because the offence consisted in a sale of *any* quantity and permitting the same to be drank at a place under defendant's control. (Groceries and Dram-shops, R. C. 1845, p. 542; State v. Cooper, 16 Mo. 552; Chitty Crim. Law, 295; 1 Greenl. § 63, 65; 2 Russell, 791-2.)

II. The grocer's license in evidence was issued under the act of 1853, (Sess. Acts, 1853, p. 111,) to continue for one year. The indictment was therefore properly framed under the act of 1845, and evidence as to permitting the liquor to be drank at a place under defendant's control was competent and relevant. (State v. Andrews, 26 Mo. 174.)

SCOTT, Judge, delivered the opinion of the court.

On the 1st of November, 1855, the defendant, in pursuance to the provisions of the act of 1845 concerning groceries and dram-shops and the amendatory act of 1853 (Sess. Acts, 1853, p. 111) obtained a license as a grocer. By the second section of the act of 1845, a grocer was defined to be a person permitted by law to sell goods, wares, merchandise and intoxicating liquor in any quantity not less than a quart; and his license continued in force one year. The third section of the act of 1845 concerning groceries and dram-shops, prohibited any grocer from selling intoxicating liquors in a less quantity than one quart, and from suffering them, when sold by him, to be drank at his grocery or at any place under his control. The revised code of 1855 took effect May 1,

1856. By the dram-shop law contained in that code it was enacted, that no person shall directly or indirectly sell intoxicating liquors in any quantity less than one gallon, without taking out a license as a dram-shop keeper. In the case of the State v. Andrews, 26 Mo. 172, it was held that this last provision did not affect licences obtained under the acts of 1845 and '53, which had not expired.

The defendant was indicted for having sold a quart of whisky in June, 1856, and permitting it to be drank at a place under his control without a license for such sale. The evidence sustained the charge as to the selling and permitting it to be drank at a place under his control. It will from this be seen that at the time of sale the defendant's license as a grocer was in force.

When the revised code of 1855 took effect, the laws of the code of 1845 were repealed and with them the third section of the act concerning groceries and dram-shops. Now it is maintained for the State that, although the code of 1845 was repealed on the 1st of May, 1856, yet, as to the licenses granted under that code and continuing in force after its repeal, the third section of the act of 1845, above cited, continued in force so as to punish grocers dealing in virtue of those licenses for a violation of it. The legislature could not revoke a license which had been sold and paid for, but they could repeal a statute which punished a violation of the law under which it had been granted. The argument is founded on the idea that the third section of the act of 1845 was a part of and so inseparably connected with the license, that the license would give that section vitality so long as it continued in force. The second section of the act of 1845 defined a grocer as has been stated. The third section was separate from and independent of the second section. It was as though it had been placed in another act. If the third section had been placed in the act concerning crimes, and that act had been repealed, could a grocer have been punished for a violation of it? Can it make a difference that it is placed in the same act which grants the license? If one

State v. Andrews.

purchases from the legislature the privilege of carrying on a business for a stated term, and at the time of the purchase there is a law regulating the exercise of the privilege and making the abuse of it penal, if that law is repealed whilst the right to exercise the privilege continues, how can its abuse be punished after the repeal of the law?

I do not see how the indictment in this case could reach the offence of suffering liquor to be drank at the place of sale or other place under the control of the grocer. That is not the offence set forth in the indictment. The charge is for selling a quart of whisky and permitting it to be drank at a place under the control of the defendant without having a license authorizing the sale of said liquor. Under such an indictment, if a license to sell is produced, is it not an answer to the charge? It is obvious that where the offence intended to be punished is only the suffering the liquor to be drank at the place of sale, the indictment must be differently framed from one charging a sale without a license.

Reversed; Judge Richardson concurs. Judge Napton absent.

THE STATE, Defendant in Error, v. ANDREWS, Plaintiff in Error.

1. Under an indictment, founded on the act, approved December 13, 1855, regulating dram-shops, (R. C. 1855, p. 682,) charging that the defendant unlawfully sold a quantity of spirituous liquor, to-wit, one pint of whisky, without having a dram-shop keeper's license or any other authority for that purpose; it might be shown that the defendant sold a quantity of whisky less than a pint; it would not be a fatal variance.

Error to Polk Circuit Court.

Wright, for plaintiff in error.

There was a variance in the proof and allegation. The indictment in this case is similar to the indictment in the case of the State v. Arbogast, 24 Mo. 363.

Ewing, (attorney general,) for the State.

The offence consists in selling in any quantity less than a gallon without a license. It is not necessary to prove the exact quantity as charged. (*State v. Cooper*, 16 Mo. 552.) The circumstance which in point of law is essential to the offence is a sale in any quantity less than a gallon, and if the proof corresponds to the allegation in this respect, it will suffice. (1 Chitty Cr. Law, p. 293; 2 Russell, 791-2, 788-9.)

RICHARDSON, Judge, delivered the opinion of the court.

The indictment charges that the defendant unlawfully sold a quantity of spirituous liquor, to-wit, one pint of whisky, without having a dram-shop keeper's license or any other authority for that purpose. The proof was that the defendant sold less than a half-pint of whisky. It was objected that there was a fatal variance, and that a conviction could only be had on proof that the defendant sold the exact quantity stated in the indictment.

The first section of the dram-shop act (R. C. 1855, p. 683) prohibits any person from selling intoxicating liquors in any quantity less than one gallon without taking out a license as a dram-shop keeper. It is an offence to sell any quantity less than a gallon, but the exact quantity is not material; (*State v. Cooper*, 16 Mo. 551;) and as a general rule an indictment will be sustained "if the proofs correspond with the allegations in respect of those facts and circumstances which are in point of law essential to the charge." (1 Chitty Crim. Law, 293.)

In the case of the *State v. Arbogast*, 24 Mo. 363, the defendant was charged with selling intoxicating liquors in a quantity — than one quart, to-wit, one half pint of whisky. The circuit court quashed the indictment, and the only question before this court and the only one decided was whether the indictment was good. The indictment was held to be sufficient, which reversed the judgment, and the observations

State v. Andrews.—Cravens v. Faulconer.

in the opinion as to the kind of evidence which would be required to support the indictment were foreign to the only question really decided or before the court.*

The judgment will be affirmed; Judge Scott concurring. Judge Napton absent.

THE STATE, Respondent, v. ANDREWS, Appellant.

1. State v. Andrews, ante, p. 14, affirmed.

Appeal from Polk Circuit Court.

SCOTT, Judge, delivered the opinion of the court.

This case is like that of State v. Andrews at this term, in which I wrote the opinion. Reversed; Judge Richardson concurs. Judge Napton absent.

CRAVENS *et al.*, Appellants, v. FAULCONER *et al.*, Respondents.

1. It is not necessary, in order to give validity to a will, that the testator should actually sign the same in the presence of the attesting witnesses.
2. The attesting witnesses must subscribe their names to the will in the presence of the testator; but it is not necessary that they should subscribe in the presence of each other.
3. In a statutory proceeding to contest the validity of a will, the burden of proof rests upon the defendants; consequently they have the right to open and close the case to the jury.

Appeal from Clinton Circuit Court.

Adams, for appellants.

I. Under our statute of wills, the subscribing witnesses must sign at the time the will is signed by the testator. (R. C. 1855, tit. Wills, § 4, 18, 19, 20, 30 and 33.)

Cravens v. Faulconer.

II. Even if the witnesses could attest or sign the will at a subsequent time upon an acknowledgment by the testator that he had signed it as his will, still the law requires that the witnesses themselves should sign at the same time; for they are not only to attest the corporal act of execution by the testator, but must attest his soundness of mind at the time. (R. C. 1855, tit. Wills, § 4, 18, 30 and 33; *Withington v. Withington*, 7 Mo. 589; *Walker v. Walker*, 2 Scam. 294.)

III. But whether the witnesses can sign at separate times or not, still the respondents were bound to call two of the subscribing witnesses, if to be had, and prove by them that the testator was of a sound mind when he signed the will, and therefore the second instruction asked by the appellants was improperly refused. (R. C. 1855, tit. Wills, § 4, 18, 19, 20, 30 and 33; *Withington v. Withington*, 7 Mo. 589; *Heyward v. Hazard*, 1 Bay, 335; 2 Scam. 294.)

IV. The appellants were the plaintiffs below, and they had the right to open and conclude the argument to the jury. This is the universal practice, and it was error in the court to refuse them this privilege. It gave an undue advantage to the respondents to which they were not entitled.

Hall, for respondents.

I. It is not necessary that the witnesses should attest the will at the time the testator signs it, nor is it necessary that they should attest it at the same time. (1 *Jarman on Wills*, 115; 2 *Greenl. Ev.* § 676; 4 *Kent*, 580; 3 *Greenl.* 59; R. C. 1855, p. 1567, § 6.) The second instruction asked by plaintiffs was properly refused. It is based on the supposition that both witnesses must attest the will at the time it is signed. The third instruction was also properly refused.

II. The defendants were properly permitted to open and close. The issue before the jury was "whether the writing produced was the will of the testator or not." That is the issue and the only issue allowed by the statute in cases of this sort. The defendants affirmed: the plaintiffs denied.

Cravens v. Faulconer.

(1 Greenl. Ev. § 77 ; Hawkins v. Simmes, 13 B. Mon. 269 ; Rogers v. Thomas, 1 B. Mon. § 30 ; Act concerning Wills, R. C. p. 1571, 1572.) Even if the court below erred in awarding the opening and closing the case to the defendants, it is not such an error as this court will notice. (Wade v. Scott, 7 Mo. 515.)

RICHARDSON, Judge, delivered the opinion of the court.

This was a proceeding to contest the validity of the will of Nelson Faulconer, and the only questions in the case are, whether the testator must actually sign his will in the presence of the attesting witnesses, and whether it is necessary for the witnesses to subscribe their names to the will in the presence of each other.

The fourth section of our statute of wills directs that "every will shall be in writing, signed by the testator, or by some person by his direction in his presence ; and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator ;" and it is almost a transcript of the English statute of 29 Char. II, which requires all devises and bequests of land to be in writing and signed by the testator or by some person in his presence and by his express direction, and to be attested and subscribed in the presence of the devisor by three or four witnesses. It is manifest that the provision of our act in question was borrowed from the British statute, which has so often been under the consideration of their courts that it has become well settled by a long continued and uniform construction, which we can not disregard. The witnesses must subscribe their names in the presence of the testator in order that they may not impose a different will on him, but it is not necessary that they shall attest the very act and *factum* of signing by the testator. Though he must do some act declaring it to be his will, no particular form of words is required ; and it is uniformly held that it is not necessary that the testator shall actually sign his name to the will in

Cravens v. Faulconer.

the presence of the attesting witnesses ; but the acknowledgment by the testator that the name signed to the instrument is his, or that the paper is his will, is sufficient. (1 Jarman on Wills, 72 ; 1 Powell on Devises, 83 ; 4 Kent, 516 ; 2 Greenl. Ev. § 676.)

It was once supposed that the acknowledgment by the testator must take place in the simultaneous presence of all the witnesses, but it has long since been decided and uniformly held in England, until the statute of 1 Vict. and by the American courts in construing similar provisions to ours, that it is not necessary to the due execution of a will that all the attesting witnesses shall subscribe their names at the same time or in the presence of each other. (1 Jarman on Wills, 72 ; Powell on Devises, 110 ; 4 Kent 516 ; 2 Greenl. Ev. § 676 ; Deney v. Deney, 1 Mete. 342.) It is the business of the subscribing witnesses not merely to attest the corporal act of signing by the testator, but to "try, judge and determine whether the testator is *compos* to sign ;" and though the heir has the right to have the sanity of the testator proved by all the witnesses whom the statute has placed about his ancestor, it has never been held that the witnesses must subscribe in the presence of each other. The case in 2 Scam. 294, cited by the plaintiffs, is not in point, for it depends on the statute of Illinois, which is essentially different from ours.

The eighteenth section of our statute, cited by the plaintiffs to support their view, in our opinion warrants a contrary inference. The seventeenth section provides, that if any witness shall be prevented by sickness from attending at the time any will may be produced for probate, or resides out of the state or more than forty miles from the place where the will is to be proved, the court or clerk shall issue a commission directed to any judge, &c., authorizing him to take and certify the attestation of such witness. And the eighteenth section prescribes what the witness shall prove, namely, that the testator signed the writing annexed to the commission as his last will, or that some other person signed it by his direc-

Riggins v. McClellan.

tion and in his presence; that he was of sound mind, and that the witness subscribed his name thereto in the presence of the testator. It is not required to be proved that the witness subscribed his name in the presence of the other witnesses; and if the testimony of each witness is taken separately under the directions of the seventeenth section, and proves no more than is required by the eighteenth, a will would be established though it did not appear from the testimony of either of them that all of them signed at the same time, or in the presence of each other.

The only issue in the case under the thirtieth section of the statute was whether the writing produced was the will of the testator or not, and as the *onus* was on the defendants, they had the right to open and close the case. (1 Greenl. Ev. § 77.)

Judge Scott concurring, the judgment will be affirmed. Judge Napton absent.



RIGGINS *et al.*, Plaintiffs in Error, v. MCCLELLAN *et al.*,
Defendants in Error.

1. In the year 1842, a testatrix, domiciled in the state of Kentucky, died there. By her will she made the following bequest: "I give and bequeath to my daughter, Margaret Dean, a negro girl named Hannah, for to be at her disposal during her natural life, then to go to the benefit of her heirs." Held, that the daughter took an estate for life only, with remainder to her heirs, who would take under the will by purchase.
2. The rule in Shelly's case was not in force as law in the state of Kentucky in 1842 at the death of the testatrix.

Error to Pettus Circuit Court.

Adams, for plaintiffs in error.

I. The will vested the title to the slave Hannah absolutely in Margaret Dean. The word "heirs" in the fourth clause of the will is a word of limitation and not of purchase. That clause comes directly within the rule in Shelly's case. (2

 Riggins v. McClellan.

Jarm. on Wills, 178; 4 Kent, 214; 4 Bibb, 390; 4 Monr. 199; 10 B. Monr. 60; 4 Har. & Jo. 431; Doe v. Colyer, 11 East, 548; Doe v. Jesson, 2 Bligh, 2; Doe v. Harvey, 4 Barn. & Cress. 610; Dott v. Cunnigton, 1 Bays, 453; Carr v. Porter, 1 McCord, 60; Polk v. Faris, 9 Yerger, 209; Ray v. Garnett, 2 Wash. 9; Lisle v. Diggs, 6 Har. & Johns. 364; 1 Dall. 139; 7 Watts & Serg. 295; Bishop v. Sellick, 1 Days, 299; Hubert v. Hulbert, 21 Mo. 277.) As the domicil of the testatrix was in Kentucky at the time of her death, which occurred in 1842, the laws of that state would govern this case. (Story's Conflict of Laws, § 390, 403—410; Spradling & Keeton v. Pipkin, 15 Mo. 118.)

II. In any view of the case the judgment must be for the appellants, for, even if the rule in Shelly's case did not apply, by the terms of the gift, the power to dispose of the fee was vested in Margaret Dean; and the deed of gift to the appellants was an execution of the power which passed the absolute estate in the slaves to them. The bequest was to Margaret Dean of the slave "*Hannah for to be at her disposal during her natural life, then to go to the benefit of her heirs.*" Here was a complete power of disposition vested in Margaret Dean, and the supposed remainder was dependent upon the failure to exercise the power; but as the power was executed by the deed of gift to the appellants, the fee in the slave passed to them and the remainder could not take effect. (See Moore v. Webb, 2 B. Monr. 222; 3 Littell, 415; 4 Kent, Comm. 319; Ruby v. Barnett, 13 Mo. 5; Jackson v. Robins, 16 Johns. 587; 1 P. Wms. 149; Reed v. Shingold, 10 Ves. 370; Goodtitle v. Oterny, 2 Wills. —.)

Ryland & Son, Muir & Draffin, for defendants in error.

I. By the law of Kentucky a person may give or bequeath slaves to one person for life and the remainder to such person's heirs, and such remainder is lawful and effectual. In a devise of personal estate, the expression "dying without issue" means, *ex vi termini*, issue living at the death

Riggins v. McClellan.

of the first taker. (4 Monr. 199; Moore's Trustees v. Howe, 4 Bibb, 390; 5 Dana, 427; 3 J. J. Marsh. 90; id. 889; 1 Marsh. 532; 3 Bibb, 39; 5 J. J. Marsh. 355; 3 Ben. Monr. 56, 106; 7 B. Monr. 14; 12 B. Monr. 653; 3 Jarfm. on Wills, 10; 4 Dana, 551; 1 Burrow, 162; 1 Bailey, S. C., 100; 4 Kent, 128; Tucker's Comm. 90, 144; 1 Denio, 165; 8 Sim. 166; 7 Monr. 307; 3 Monr. 537; 9 Dana, 348; 6 J. J. Marsh. 595; 5 Dana, 427; Willes Rep. 332; 2 Blackstone's Comm. 379; Fearne on Cont. Remainders, 467; 10 Johns. 12; Cruise's Digest, tit. 32, chap. 26, § 25, 26, 27; Cowper, 234; 2 Call, 313; 6 Pet. 72.)

RICHARDSON, Judge, delivered the opinion of the court.

The controversy in this cause turns on the construction of the fourth clause of the will of Mrs. Elizabeth McCutchen, which is as follows: "I give and bequeath to my daughter Margaret Dean, a negro girl named Hannah for to be at her disposal during her natural life, then to go to the benefit of her heirs." The testatrix died in the state of Kentucky in 1842, where she had her domicil, and where her will was executed and duly probated.

The defendants insist that the word "heirs" in the fourth clause of the will is a word of limitation and not a word of purchase, and that by the rule in Shelly's case the limitation over was void, and the absolute property in the slave vested in the first taker. Both of the parties concede that as the will only disposes of personal property, it must be interpreted according to the law of the domicil of the testatrix, and we must therefore look to the law of Kentucky for ascertaining the principles which must govern the case.

The rule in Shelly's case "that wherever the ancestor takes an estate for life and in the same conveyance a remainder is limited to *his heirs* or *the heirs of his body*, he will be vested with the fee and his heirs will take by descent and not by purchase," has become firmly established in England as a rule of property; and though the policy and reason of

Riggins v. McClellan.

it have long since ceased, it has resisted every assault, and the strict and technical sense of words is allowed to overrule the manifest and avowed intention of the parties to an instrument. If the word "children" or "issue living at the death of Mrs. Dean," had been used, the limitation would have been valid; but it is said that the word "heirs" is a word of limitation which was intended to mark the nature, extent and continuance of the estate, and as it denotes the whole line of the testatrix's heirs in succession, and not particular designated persons, it must operate to expand a life estate in Mrs. Dean into an absolute estate.

But if the rule in Shelly's case was ever recognized in Kentucky, it was made subservient to the intention of the parties, and its application was subordinate to the sense in which the word "heirs" or "heirs of the body" was used. The court of appeals, in *Moore v. Moore*, 12 B. Monr. 656, observed, "that expositions are to be made according to common intendment is agreed by all. To whatever instrument we may be giving a construction, the words which have been employed by their author should be taken in the sense in which he understood them; and, in cases in which technical rules have been applied to particular expressions by the courts, if we are satisfied, after an examination of the instrument, these technical rules will not carry out but defeat the intention of the author, the technical rules must yield to the intention, and such a construction must be given as will effectuate it." In *Prescott v. Prescott's heirs*, 10 B. Monr. 58, it was admitted that the words "heirs of the body" standing alone were appropriate words of limitation; but it was said that it was "well settled by numerous decisions that not only 'heirs of the body' but the more general word, 'heirs,' or the more specific terms, 'heirs male, or heirs female of the body or of two bodies,' may be used and operate as words of purchase." And in a subsequent case, in the same volume, the words "heirs of the body" were construed to mean children; (*Jarvis v. Quigby*, 10 B. Monr. 106;) and a remainder created by these words held good.

Riggins v. McClellan.

Not a case has been found in the Kentucky Reports which was decided on the authority of the rule in Shelly's case. In some of the cases the rule is recognized, but so modified that its force is impaired if not destroyed, and a growing feeling of dissatisfaction is manifested against permitting an arbitrary and technical rule to override the intention of the parties; and whatever doubts may have existed previously as to whether the rule ever had any application in that state, are removed by the case of Turman v. White's heirs, 14 B. Monr. 560, in which the rule is repudiated and its application denied. In that case the grantor David White, by a deed executed in 1803, in consideration of love and affection for Solomon White, and for the further consideration of one dollar, "gives and grants to the said Solomon White during life, and then to his heirs or executors," a tract of land described by its boundaries, "to have and to hold the said tract or parcel of land unto the said Solomon White, his heirs and executors, against the claim of said David White, his executors and administrators, unto the said Solomon during life, then to his heirs forever." The plaintiffs contended that Solomon White only took a life estate, and they sought to recover by force of the deed as purchasers under the designation of *heirs*. The defendant attempted to defend under a deed executed by Solomon White, purporting to convey the whole estate, and the turning point in the case was, whether Solomon White took by the deed a life estate only, or whether the term "to his heirs" was a word of limitation and not of purchase, and operated to enlarge a life estate into a fee simple. There could not be a clearer case for the application of the rule. In other cases the court had seized upon casual expressions in instruments for the purpose of ascertaining the actual intention of the parties and repelling the application of the rule, but in the case of White's heirs there was nothing in the deed to indicate the purpose of the grantor beyond the words which are quoted, and the court was brought directly to the point, and was compelled to decide whether the word "heirs," standing alone, could be

Riggins v. McClellan.

construed, in violation of the rule in Shelly's case, to be a word of purchase, and to mean children or descendants living when the life estate expired. It was held that upon the face of the deed it was clear that the grantor intended to give to Solomon White an estate for life only, and at his death to give the land to his heirs; and that as Solomon White only acquired a life estate, he could not convey a greater interest, and the grant to the heirs took effect at his death in favor of those who were his heirs. The rule in Shelly's case was pressed on the court as decisive of the cause, but it was denied to have any practical application in Kentucky; and Judge Marshall, delivering the opinion of the court, observed, "as there is no reported case in which this court has applied the rule with the effect of determining by it the rights of property involved, it can not be said to have become a rule of property here, and especially as we believe it has not been so considered and acted on in the community. A single manuscript decision of recent date—*Humphreys v. Ayres*, January, 1852, and withheld from publication as if of doubtful authority—presents the only instance referred to in which the rule has been directly applied and carried out; and in the few cases in which its existence as a common law rule has been spoken of, the court, without any direct recognition of its authority as a binding rule here, but sometimes intimating the contrary, has evaded its application by seizing upon circumstances deemed sufficient to show that the case did not come within the rule."

The revised statutes of Kentucky, of 1852, give effect both to the limitation for life and to the subsequent limitation to the heirs, and the learned Judge further remarks, in White's case, that "we may presume that if this court had at any time before the enactment of the revised statutes decided that in case of a grant to one for life, and at his death to his heirs, the whole estate vested in the ancestor and that his alienation had passed it from his heirs, a statute similar to that just referred to would at once have been enacted."

The question arose again in 1857, in the case of William-

Riggins v. McClellan.

son v. Williamson, 18 B. Monr. 329, on the following clause in the will of Gen. James Taylor, who died before the revised statutes were enacted: "The tracts or lots which I give to my daughters, they are to have, hold and enjoy the rents and profits of the same for their separate use during their natural lives, and at their deaths the title of the same *to vest in their heirs forever.*" It was decided that the rule was not in force and had no application in Kentucky, and that the testator's grand-children took under the will as purchasers.

We have examined all the Kentucky cases—which are very numerous—that relate to the subject, and we have decided this case on principles drawn from the decisions in that state. We have traced the current from its fountain and have found no difficulty in following it, for it has grown broader and deeper as it flowed, until it has swept away the last vestige of a rule which was only respectable for its antiquity. At first it was admitted that the rule existed; it was next qualified; it was afterwards doubted, and finally overthrown.

We think that the testatrix in this case intended only to give the slave to her daughter for the term of her life; for the expression "during her natural life" clearly imports during her life only, and the adverb "then" shows not only the period at which Mrs. Dean's interest was to cease, but the time at which the slave was "to go to the benefit of her heirs." As Mrs. Dean only took an interest for life, she could not defeat the remainder by selling the slave, and the expression "for to be at her disposal during her natural life" did not authorize her to dispose of any greater interest than she had, and was intended, we think, by an unskillful draftsman, only to confer the largest liberty in the use of the slave during her life and to the extent of her interest. She had only a life estate, and with that interest she could do as she pleased; but her interest ceased at her death, and then the remainder passed to her children or their descendants, who were equally with herself the objects of the testatrix's bounty. (*Broach v. Kitchen*, 23 Geo. 515.)

It may be observed that the rule in *Shelly's* case was abro-

Welch v. Bryan.

gated in this state, in respect of limitations by will, by the eighteenth section of the statute of wills of 1825, and, in regard to conveyances, by the seventh section of the act of 1845 concerning conveyances

Judge Scott concurring, the judgment will be affirmed.
Judge Napton absent.

WELCH, Respondent, v. BRYAN, Appellant.

1. An agreement to purchase an improvement on public land made before the entry of such land in the land office will, if entered into before the entry of the land, support an action; if such agreement be made after the entry of the land, it will be void for want of consideration.
2. Where no cause of action is stated in a petition, the defect will not be cured by verdict; the objection may be taken by motion in arrest of judgment.

Appeal from Dent Circuit Court.

Pomeroy, Frazier & Waddell, for appellants.

I. The court erred in overruling the demurrer and motion in arrest. There was no evidence of any contract between the parties. A promise to pay for improvements, made after the entry of the land, is a nullity.

Wingo & Williams, for respondent.

I. This court will not interfere with the verdicts of juries on the ground that they are against the weight of evidence. (24 Mo. 97; id. 216; 20 Mo. 312.)

RICHARDSON, Judge, delivered the opinion of the court.

The motion in arrest, in this case, presents the question, whether the petition was sufficient to support the judgment. It is stated in the petition that on or about the first of January, 1856, the plaintiff owned an improvement consisting of a dwelling-house, out-houses, and a field on a tract of land belonging to the United States; that the defendant entered

Welch v. Bryan.

the land on the 18th January, 1856, and that the "defendant *at the time* of said purchase and divers times since did undertake and faithfully promise to pay said plaintiff what said improvements were reasonably worth," &c.

An agreement to purchase an improvement on public land before the land is entered will support an action ; (Burns v. Hayden, 24 Mo. 215 ;) but a promise made after the land is entered is void for want of consideration, and it was therefore necessary that the petition should state whether the agreement relied on was made before or after the land was purchased from the United States. The plaintiff of course knew, and, as it would have given him no trouble to have stated the time, there is no excuse for omitting an averment so material. The allegation that the promise was made *at the time* of the entry hardly means that it was made in the land office when the defendant was in the act of paying the purchase money and receiving the receiver's certificate, but the ordinary meaning of such language is that the contract was made about the time of the entry, either before or after, but whether at the one time or the other the plaintiff did not commit himself, and therein failed to state an essential fact to a right of action.

In determining motions of the kind, we must decide from the record only, and not from what took place at the trial; and though we may presume, after verdict, that every thing was proved which the averments in the petition will warrant, we can presume nothing more, and we can not suppose that a cause of action was proved when none is stated. Where no cause of action is stated, the omission is not cured by verdict; for as no right of action was necessary to be proved, it can not be presumed that it was proved at the trial. It would be absurd to permit a party to take a judgment when he has no cause of action, and such an objection is not waived by the failure of the defendant to demur; for the statute, after stating the causes of demurrer, proceeds in the tenth section of the same article (R. C. 1855, p. 1231) to say, that, "if no such objection be taken by demurrer or answer, the defen-

Bryan v. Miller.

dant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court over the subject matter of the action, and excepting the objection that the petition does not state facts sufficient to constitute a cause of action."

The ninth clause of the 19th section (R. C. 1855, p. 1256) of the statute of jeofails, viz., "for omitting any allegation or averment without proving which the triers of the issue of fact ought not to have given such a verdict," is only a declaration of the common law that a verdict will aid a title defectively set out, but not a defective title. (2 Tidd's Practice, 919.) This rule is construed to mean that if a material fact, though not expressly stated, be necessarily implied from what is stated, the cause of action must be considered as only defectively stated and the defect will be cured by verdict; but if an essential fact to the plaintiff's right of action is neither expressly stated nor necessarily implied from facts which are stated, the declaration must be considered as defective and the judgment will be arrested. A verdict will not aid the want of consideration in the petition.

The motion in arrest ought to have been sustained; and the judgment will be reversed and the cause remanded with leave to the plaintiff to amend his petition; Judge Scott concurs. Judge Napton absent.



BRYAN *et al.*, Plaintiffs in Error, v. MILLER *et al.*, Defendants in Error.

1. A verified statement upon which a confession of judgment is rendered must state concisely the facts out of which the indebtedness arose. If it state the execution of a promissory note to the plaintiff; that "said note was given for goods, wares and merchandise sold by the plaintiff to the defendant before the date thereof," it will be materially defective.
2. A judgment rendered upon such a statement, though not valid as to other judgment creditors, would be valid between the parties thereto. The defective statement might be amended, but not so as to affect rights of existing judgment creditors.

Bryan v. Miller.

Error to Clay Circuit Court.

Hovey, for plaintiff in error.

I. The court below ought to have set aside the judgment by confession, because the statement sets out no particulars of the time, place, quantity, description or price of the supposed consideration of the note, and is a mere evasion of the statute under which it is made. (See *Chappell v. Chappell*, 2 Kerr. 215; *Gilman v. Hovey et al.*, — Mo. 26.)

Parsons and Edmunds, for respondents.

I. The statement on which the judgment was rendered against Murray does set out *concisely* the facts out of which the debt arose; the statement shows the note was given for goods, wares, &c., sold before that time to Murray. It was not necessary to state the kind, description, or quality of the goods; the object of the law being to require the debtor to set out substantially the essence of the consideration only out of which the indebtedness arose. This has been done in this case. (R. C. 1855, p. 1282, § 2.)

RICHARDSON, Judge, delivered the opinion of the court.

The plaintiffs, as subsequent judgment creditors of Murray, filed their motion to set aside a judgment confessed by Murray to the defendants, on the ground that the statement was not in compliance with the statute. The statement is as follows: "The defendant Ephraim D. Murray states that he is justly indebted to the above named plaintiffs [Miller and others] the sum of sixty-eight dollars, and he asks the court here to render a judgment against him therefor in favor of said plaintiffs. He states that on the 27th day of August, 1857, he executed his promissory note to the said plaintiff for the sum of sixty-six dollars and sixty-five cents, due four months after the date thereof; that said note was given for goods, wares and merchandise sold by the plaintiffs to defendant before that date, and that no part of said note

Bryan v. Miller.

has been paid, but the whole of the principal and interest therein is still justly due and owing."

The statute requires that a statement in writing must be made, signed by the defendant and verified by affidavit to the following effect: "First, it must state the amount for which the judgment may be rendered and authorize the entering of judgment thereon; second, if it be for money due or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due or to become due." (R. C. 1855, p. 1282, § 22.) This provision of our law was taken literally from the New York code, and though the inferior courts in that state differed for a while as to its construction, its meaning is now well settled. It is said that the policy in requiring verified statements to state concisely the facts out of which the indebtedness arose, is to point the other creditors of the debtor to the precise transaction out of which the confessed indebtedness arose, to enable them to inquire into its truth, and to confine the defendant and the creditors to whom the judgment is confessed to the particular matter set forth as the foundation of the judgment, in case its good faith should be attacked. (*Gandal v. Finn*, 23 Barb. 652.) And in *Chappel v. Chappel*, 2 Kern. 215, it was observed by the court of appeals that "the object was to improve the condition of other creditors, by compelling the parties to spread upon the record a more particular and specific statement of the facts out of which the indebtedness arose, thus enabling them, by a comparison of that statement with the known circumstances and relations of the debtor, to form a more accurate opinion as to his integrity in confessing the judgment than was possible under the old system." The same views are re-asserted in a recent case decided in the same court less than a year ago. (*Dunham v. Waterman*, 17 N. Y. Rep. 9.) We think these views are just and reasonable, and though their practical application in some cases may seem harsh, they will tend generally to prevent fraud and save the records of the courts from becoming instruments of injustice. It has been held

Ray v. Stobbs.

that a general allegation that the debt was "for goods sold and delivered," or on account "of a promissory note" of a certain date and amount, or "on a note given for goods sold and delivered," or "on a note given on a settlement of accounts," is insufficient.

In this statement the consideration is stated to be goods, wares and merchandise sold by the plaintiffs to the defendant before the date of the note, but no time is stated, nor the particular kind of property sold included in the general description of "goods, wares and merchandise." If the statement required to be made is to be of any service to the other creditors of the judgment debtor, it ought to state—where the indebtedness is for property sold—when and what kind of property was sold, the price or the aggregate of the purchase, and the amount of payments, if any. It is not necessary that the statement should be as particular as a bill of particulars, but it ought to be sufficiently particular to afford a clew to a creditor, if there is fraud and he desires to investigate it.

The judgment will be valid between the parties, though it may not be so as to other judgment creditors, and the statement may be amended, but not so as to interfere with the rights of other judgment creditors which may have attached in the mean time. Judge Scott concurring, the judgment overruling the plaintiffs' motion will be reversed and the cause remanded. Judge Napton absent.



RAY, Respondent, v. STOBBS, Appellant.

1. When the defendant in an execution is not a resident of the county in which the land sought to be sold is situated, the plaintiff in the execution should give notice to the defendant of the issuing of the same as required by section 46 of the act regulating executions. (R. C. 1855, p. 766, § 46.) Should no such notice be given, and property be levied on and sold under the execution, the defendant may on the return day of the execution move the court to set aside such sale, and the court should set aside the same although the sheriff may have executed the deed to the purchaser before the return day of the execution.

Ray v. Stobbs.

Appeal from DeKalb Circuit Court.

William Ray obtained a judgment against William Stobbs before a justice of the peace of DeKalb county. A transcript of the judgment was filed in the office of the clerk of the De Kalb circuit court. An execution was issued by said clerk directed to the sheriff of Andrew county. Real estate belonging to the defendant Stobbs, situate in Andrew county, was levied on and sold under this execution. The defendant was a resident of DeKalb county. The plaintiff did not notify the defendant of the issuing of the execution to Andrew county, nor did the defendant have notice thereof until after the sale by the sheriff. On the first day of the term to which the execution was returnable the defendant moved the court to quash the execution and set aside the sale thereunder on the ground, among other alleged irregularities, that the plaintiff had not notified the defendant of the issuing of said execution. The plaintiff and the purchaser resisted this motion. The court overruled it.

Shambaugh, for appellant.

I. The defendant being a resident of DeKalb county, he was entitled to notice of the issuing of the execution to Andrew county. (R. C. 1855, p. 766, § 46.) For this reason the sale should be set aside. This point was not decided in the cases of *Hobein v. Murphy*, 20 Mo. 447, and *Hobein v. Drewell*, 20 Mo. 450.

SCOTT, Judge, delivered the opinion of the court.

We do not consider that the principle of the case of *Hobein v. Murphy*, 20 Mo. 447—that a fair purchaser who had paid the price and received a conveyance could not be affected by a failure of the plaintiff in an execution to cause notice to be served on the defendant in the execution, who was a non-resident of the county in which the land sought to be sold is situated—is applicable to the proceeding before us. (R. C. 1855, tit. Execution, § 46.) That was an original petition to

Bernard v. Callaway County Court.

set aside a sale after the transaction was completed. Here the party comes in on the return day of the execution and moves the court to set aside the proceedings of the officer for irregularity on the part of the plaintiff in the execution. It is the undoubted duty of every court to see that its process is not abused and perverted to the oppression of individuals. At the return day of process courts will see that it has not been executed in an illegal or oppressive way, and will give summary redress. Every one taking title under the process of a court must be understood as taking subject to the approval by the court of the proceedings had under it. It does not appear when the sheriff executed a deed, but although the sale was made in another county and before the return day of the execution, yet the deed need not have been made until after the return day of the execution, and the making of it before could not take away the right of the defendant.

Judgment reversed and cause remanded ; Judge Richardson concurs. Judge Napton absent.

BERNARD *et al.*, Plaintiffs in Error, v. CALLAWAY COUNTY COURT, Defendant in Error.

1. Under the general law concerning roads and highways, (R. C. 1855, p. 1390, § 20,) only those persons who own land through which the route of a state road is located and who consider themselves aggrieved by the assessment of the commissioners can object in the county court to the approval of the report of the commissioners locating the road.
2. Parties aggrieved by the location of a state road have a right of appeal to the circuit court. Since, however, there is no provision authorizing the signing of bills of exceptions in such cases, the circuit court must affirm or reverse on the record alone.

Error to Callaway Circuit Court.

Hardin, for plaintiffs in error.

I. Defendants had the right of appeal from the county to the circuit court. (The county of Cooper v. Geyer, 19 Mo. 257.)

Bernard v. Callaway County Court.

II. The appeal was taken in due form of law and the court committed error in dismissing the appeal.

SCOTT, Judge, delivered the opinion of the court.

This was a proceeding under a special act, passed February 16, 1857, (Sess. Acts, 1857, p. 811,) entitled "An act to establish a state road in Callaway and Audrain counties." The act directed that the contemplated road should be opened and kept in repair under the law in force at the time in the counties in which it is located. It does not appear that any other than the general road law was in force in those counties. The commissioners appointed by the aforesaid act made their report to the Callaway county court at the December term, 1857; whereupon, as the record states, Thomas Bernard and others appeared by their counsel and objected to the approval of said report, but their objections were overruled and the report approved. An appeal was thereupon taken to the circuit court, where the appeal was dismissed, and this writ of error was sued out.

Admitting that the objectors were entitled to a writ of error on the judgment of the circuit court, there is nothing preserved in the record from which this court can see that they have been aggrieved by the action of the commissioners. The twentieth section of the second article of the act concerning roads and highways (R. C. 1855, p. 1390) provides that any person owning lands through which the route of a state road is located, who shall consider himself aggrieved by the assessment of the commissioners, may, by himself or agent, at the next term of the county court after and to which the report of the commissioners may be made, file his objections to such assessment. The subsequent sections of the act prescribe the course to be adopted upon the making of such objections. Now there is nothing in the record which shows that any objections to the assessment were made by those through whose land the road was located. Under such circumstances there was nothing for the county court to do but to confirm the report. Had the objections required by

Basye v. Ambrose.

law been made in order to have a revision of the action of the commissioners, it would have been the duty of the court to have taken the course directed by the statute; but in the absence of all specific or even general objections to the assessment, there was nothing left to be done but to confirm the report.

As we consider the parties were entitled to an appeal to the circuit court, the appeal should not have been dismissed, but the judgment of the county court should have been affirmed, as on the appeal nothing was before the circuit court but the record of the county court, as the statute allowing appeals and writs of errors in such cases has as yet provided no way by which the evidence before the county court shall be preserved so as to be used in the circuit court. (*Lewis v. Nuckolls*, 26 Mo. 278.) But as, by dismissing the appeal, the same result has been attained as would have followed an affirmance of the judgment, we see no cause for disturbing the action of the circuit court.

Affirmed. Judge Richardson concurs. Judge Napton absent.

BASYE, Plaintiff in Error, v. AMBROSE, Defendant in Error.

1. Whether a sum stipulated to be paid in case of the breach of the provisions of a contract is to be regarded as a penalty or as liquidated damages must be determined by the nature of the contract and its provisions; if the whole scope of the instrument shows that it is stipulated for as a penalty, the parties can not constitute it liquidated damages by designating and stipulating for it as such.
2. Where the agreement secures the performance or omission of various acts which are not measurable by any exact pecuniary standard, together with one or more acts in respect of which the damages on a breach of covenant are readily ascertainable by a jury, and there is a sum stipulated for as damages for a breach of any one of the covenants, such sum is a penalty merely.
3. In every answer, amendatory or supplemental, the defendant must set forth, in one entire pleading, all matters which by the rules of pleading may be set forth therein, and which may be necessary to the proper determina-

Basye v. Ambrose.

tion of the defence. (R. C. 1855, p. —, § 13.) The courts can not permit parties to dispense by agreement with the statutory provision bearing on this subject; as by agreeing that the original and amended answers shall be considered as one.

Error to Callaway Circuit Court.

This was a suit instituted by Basye on a certain bond executed by the defendant Ambrose, in favor of said Basye and one Bachman. The latter had assigned his interest in the contract to the plaintiff. The bond is sufficiently set forth below in the opinion of the court. Evidence was given bearing upon the question of the breach of the bond by the defendant. The court, among other instructions given and refused, gave the following at the instance of the defendant: "The amount specified in the bond read in evidence is not liquidated damages, but a penalty; and if the jury find the facts necessary to enable the plaintiff to recover, it can only be for such damages as he may have actually sustained by the default of the defendant, which it would, in such case, be incumbent on him to find."

The plaintiff took a voluntary nonsuit, with leave, &c.

Parsons and White, for plaintiff in error.

I. The court erred in giving the second instruction. The court had no right to interfere with the measure of damages fixed by the parties. (2 Pars. on Contr. 434-5; 2 Sto. Eq. § 1313, 1318; 1 Mo. 149; Hemplen v. Snider, 17 Mo. 258; 4 Bun. 2228; 17 Wend. 447; Story on Contr. § 1021; 2 Greenl. Ev. § 257.) The defendant should, at least, have laid some foundation for the instruction, either by alleging that the amount claimed was wholly disproportionate to the injury, or by alleging fraud, imposition, accident or mistake, or something of that sort. (2 Sto. Eq. § 1316; 17 Mo. 260; 2 Sto. Eq. § 1223; Gower v. Saltmarsh, 11 Mo. 271; 7 Whea. 17; 2 Greenl. on Ev. § 258.)

Lay and Gardenhire, for defendant in error.

I. The law is well settled that the action of the court shall be defined or determined by the terms which the parties have

Basye v. Ambrose.

seen fit to apply to the sum named in the contract. (2 Pars. on Contr. 435.) The sum agreed upon will be treated as a penalty, unless it is payable for an injury of uncertain amount and extent, or unless it be payable for *one* breach of *contract*, or if for *many*, then unless the damages to arise from *each* of *them* are of *uncertain amount*. (See 2 Pars. on Contr. 433 *et seq.*; Moore & Hart v. Platte Co. 8 Mo. 467; Gower v. Saltmarsh, 11 Mo. 271; Chiddich v. Marsh, 1 New Jer. 463; Bayley v. Peddit, 5 Sandf. 172; Crisdee v. Bolton, 3 Car. & Payne, 240.)

SCOTT, Judge, delivered the opinion of the court.

As none of the evidence is preserved in the bill of exceptions but that which related to the breaches of the condition of the bond, the instructions given and refused concerning other matters can not be reviewed in this court, as, for any thing that appears, they have been rejected as irrelevant, not being warranted by the testimony. The main point presented for our consideration is whether the sums stipulated to be paid by the defendant for a violation of the condition of the bond was a penalty or liquidated damages.

They mistake the object and temper of our system of jurisprudence who, while maintaining that men in making all contracts have a right to stipulate for liquidated damages regardless of the disproportion to the sum resulting from a breach of the contract, insist that it would be hard if men were not permitted to make their own bargains. No system of laws would command our respect or secure our willing obedience which did not to some extent provide against the mischiefs resulting from improvidence, carelessness, inexperience and undue expectations on one side, and skill, avarice and a gross violation of the principles of honesty and fair dealing on the other. The folly of one in making a wild and reckless stipulation will not justify gross oppression in another. A just man when he sees one in a situation in which he is prepared to make a contract which must grind and

Basye v. Ambrose.

oppress him, will not take advantage of his state of mind and enrich himself by his folly and want of experience. It has been remarked that in reason, in conscience, in natural equity, there is no ground to say, because a man has stipulated for a penalty in case of his omission to do a particular act (the real object of the parties being the performance of the act), that if he omits to do the act he shall suffer an enormous loss, wholly disproportionate to the injury to the other party.

By the common law, if one bound himself in a penalty of a greater sum for the payment of a less one—as if he bound himself in a penalty of two hundred pounds to pay at a given date one hundred pounds—if the less sum was not punctually paid at or before the day, the penalty was forfeited, and in an action at law upon the bond the whole of it was recovered. But courts of equity, seeing the hardship and oppression of this, interfered and granted relief on the payment of the sum really due with interest. This principle was so conformable to the dictates of natural equity, that Parliament, in the fourth year of Anne, incorporated it into the statute law and enabled courts of law to give the relief before only attainable in courts of equity; so, with regard to bonds by which the performance of other acts than the payment of money was secured by a penalty, at common law the failure to do the act, or any one of the acts whose performance was thus secured, caused a forfeiture of the penalty, and the whole of it was recovered in an action at law on the bond. Against these forfeitures courts of equity relieved the defendant upon his compensating for the damages he had actually sustained by reason of the breach of the condition of the bond. Here, as in case of bonds conditioned to pay money, Parliament, by statute, enabled a party to obtain in a court of law the relief which was afforded by courts of equity. The statute of 8 and 9 of William III. required, that in all actions upon any bond, or on any penal sum for nonperformance of any covenants or agreements contained in any deed or writing, breaches should be assigned, and that damages

Basye v. Ambrose.

should be assessed for those breaches; and although judgment as formerly was entered for the penalty, yet if the defendant, after such judgment and before execution, paid into court the damages assessed, a stay of execution was awarded on the record; or if, by reason of the execution, the damages and costs were fully paid, the defendant was discharged until a further breach of the condition of the bond. Upon this statute, Sergeant Williams (1 Saund. 58) remarks that the "words 'may assign,' in the first part, and 'may suggest,' in the subsequent part of the statute, are compulsory upon the plaintiff; for the act was made in favor of defendants and is a remedial law calculated to give plaintiffs relief up to the extent of the damages sustained, and to protect defendants against the payments of further sums than are in conscience due, and also to take away the necessity of proceedings in equity to obtain relief against an unconscientious demand of the whole penalty in cases where small damages only have accrued; and therefore it is not in the plaintiff's power to refuse to proceed according to the statute, but he must assign the breach of such covenants as he proceeds to recover satisfaction for." We have substantially incorporated into our code of laws the statutes of 8 and 9 William III., and of the 4th of Anne.

Although courts of equity relieved against penalties, yet they did not interfere where the damages were liquidated. But whilst they acted on this principle, they did not suffer their jurisdiction to relieve against penalties to be evaded by the introduction of the words into the agreement "not as a penalty, but as liquidated damages." They acted as they did in the case of mortgages, in regard to which—having declared that what was once a mortgage was always a mortgage—they treated as a nullity and utterly discountenanced any contract by which the mortgagor's right of redemption was impaired, or in any way attempted to be taken away—as they would act in the case of a usurious contract, where the borrower expressly agrees that the excessive interest should not be so regarded, but deemed a compensation to the lender for his

Basye v. Ambrose.

labor in handling and counting the money in making the loan. In such cases they would never be restrained from affording relief to the oppressed by the claim that freemen should be permitted to make their own contracts. The doctrine would amount to this: that in all cases the victim of avarice and extortion might by a contract dispense with the law which afforded him protection against the cruelty of his oppressor. Story says that in cases of liquidated damages courts of equity will not interfere to grant relief, but will deem the parties entitled to fix their own measure of damages; provided always the damages do not assume the character of gross extravagance or of wanton and unreasonable disproportion to the nature or extent of the injury. But, on the other hand, courts of equity will not suffer their jurisdiction to be evaded merely by the fact that the parties have called a sum damages which is in fact and in intent a penalty; or because they have designedly used language and inserted provisions which are in their nature penal, and yet have endeavored to cover up their objects under other disguises. (2 Story's Eq. § 1318.)

As the object of the statute, in requiring breaches to be assigned in actions on penal bonds conditioned to perform collateral acts, was to enable defendants to obtain that relief at law which had formerly only been afforded them by courts of equity, and as courts of equity, whilst they did not relieve against liquidated damages, yet would not suffer their jurisdiction to be evaded by calling a penalty damages, so courts of law, succeeding to the jurisdiction of courts of equity by virtue of the statute, will not permit the relief they are authorized to grant to be defeated by the shallow artifice of calling a penalty liquidated damages. The duty of the courts, in cases of this kind, is to ascertain when the sum stated is in fact a penalty and when it is properly intended as liquidated damages, as the just, appropriate and conventional amount sustained by the doing or not doing the act stipulated to be done or omitted.

It is obvious that every case occurring under this branch

Basye v. Ambrose.

of the law must in a great measure be determined by its own circumstances. If courts were to hold that the parties, by adopting any particular form, might relieve their contracts from their supervision, the law would be entirely defeated, as nothing would be easier than to adopt such form in every case. The nature and stipulations of the contract must determine whether the sum stipulated to be paid in case of its violation is a penalty or liquidated damages. The statute can not be evaded by arbitrarily calling a penalty liquidated damages. We shall not attempt to review the cases on this subject. They are numerous and not easily reconcilable. On such a question an entire concurrence of opinion could hardly be expected. But yet there are some rules on this subject which are generally concurred in, and those rules show that the sum stipulated to be paid in the contract before us is a penalty and not liquidated damages. The cases of *Astley v. Weldon*, 2 Bos. & Pul. 346; *Davies v. Penton*, 6 Barn. & Cres. 216; *Komble v. Farren*, 6 Bing. 141; *Boys v. Ancell*, 5 Bing., N. C., 390, and *Moore & Hunt v. Platte County*, 8 Mo. 167, show that where the agreement secures the performance or omission of various acts which are not measurable by any exact pecuniary standard, together with one or more acts in respect of which the damages on a breach of contract are readily ascertainable by a jury, and there is a sum stipulated as damages for a breach of any one of the covenants, such sum is held to be a penalty merely.

The case before us, when examined, will be found to come within the principle above stated. The defendant bound himself in the sum of one thousand dollars to Basye & Bachman as liquidated damages, not as a penalty, in consideration of certain acts to be performed by them, to go with them to California to dig for gold; to make his own clothing and shoes; to furnish himself with a good gun, two good knives, belt, tomahawk, and all such weapons as might be deemed necessary for the trip. After he had reached California, he was, if required, to aid them for two months in building a dwelling-house and lots for cattle, and to assist

Basye v. Ambrose.

them in other necessary work about gold digging. He further bound himself to work for them for three years from the time of setting out for California; to do all things necessary and proper on their journey; to work diligently, constantly and faithfully; to make a full return to them of all the gold dug and discovered by him, and to give half thereof to Bachman & Basye. In case of a failure to comply with the contract, he obligated himself to pay Bachman and Basye one thousand dollars as liquidated damages and not as a penalty, and in the event of their receiving damages over that sum he bound himself to pay whatever damages they might sustain; but in no event were the damages to be less than one thousand dollars. From this recital of the agreement, it is clear that there were acts to be performed the damages resulting from the nonperformance of which might be readily ascertained by a jury, and whose amount would be merely nominal, bearing no proportion to the sum stipulated as liquidated damages—a disproportion so great as would shock the moral sense of every one. What court would suffer a party to recover one thousand dollars from another as liquidated damages because he had failed to account for one dollar's worth of gold dust, or because he had failed to furnish himself with a knife when he already had one?

The thirteenth section of the ninth article of the practice act prescribes that in every petition, answer or reply, amendatory or supplemental, the party shall set forth, in one entire pleading, all matters which, by the rules of pleading, may be set forth in such pleading, and which may be necessary to the proper determination of the action or defence. Nothing therefore could be more surprising than, in looking over the record in this case, to see an entry, that, by the agreement of parties, the original and amended answers are considered as one in the pleading. The provision is a very wise and salutary one, freeing courts and juries of great embarrassment and the parties from much unnecessary cost. It is hard to conceive how any court could arrive at the conclusion that it possessed the power, by consent of parties, to

Cason v. Cason.

dispense with this section of the law. No reason is seen why, if the court can in such way dispense with this provision, it may not in like manner dispense with every law regulating its conduct and the making up of its records in suits between individuals.

Affirmed; Judge Richardson concurs. Judge Napton absent.

CASON *et al.*, Defendants, v. CASON *et al.*, Plaintiffs in Error.

1. Where a father gives money to his married daughter, though not to her separate use, and the husband purchases land therewith in his own name, such land will be deemed to have come to the husband in right of the marriage within the meaning of the third section of the dower act of 1845, (R. C. 1845, p. 430, § 3,) and if it remain undisposed of at the death of the husband, the widow will be entitled to it.
2. Resulting trusts are not within the statute of frauds.

Error to Callaway Circuit Court.

This was an action for partition of lands commenced by the collateral heirs of Larkin Cason, deceased, against his widow. With respect to one tract of eighty acres the widow set up as a defence that it did not belong to said Larkin Cason, inasmuch as it had been purchased with money given to her by her father James Luggett to be invested for her in land. With respect to this matter the court found the facts to be as follows: "That James Luggett, the father of defendant, after her intermarriage with the intestate Larkin Cason, gave to her the sum of two hundred dollars to purchase land, and that said fund came to the possession of said Larkin, who entered the east half of the north-west quarter of section 24, township 45, range 11, in his own name, with a portion of said fund; but, it not appearing to the satisfaction of the court that said money was given for the separate use of the defendant, it is considered and adjudged that the petitioners are entitled to partition thereof as heirs at law of said Larkin Cason."

Cason v. Cason.

Hardin, for plaintiff in error.

I. The land in question came to the husband in right of his wife. The court erred in declaring the law of the case.

Jones & Hayden, for defendant in error.

I. Whether there was a trust intended by James Luggett, the father of Mary Cason, was purely and simply a question of fact arising upon the oral testimony of the witnesses. It was a question peculiarly within the province of a jury or the court sitting as a jury, and this court will not disturb the judgment rendered in the cause. (*Cadwallader v. Cadwallader*, 26 Mo. 76.) There was neither an express trust nor a resulting trust proved. (*Thompson v. Renoe*, 12 Mo. 158; *Rotsford v. Burr*, 2 Johns. Ch. 408, 444; 5 Johns. Ch. 19.) Before equity will compel the husband or his representatives to execute a trust, there must be clear and unequivocal evidence of the trust sought to be established. (*Walker v. Walker*, 25 Mo. 367.) There was no error in excluding the will of James Luggett from the consideration of the court. This land did not revert to the wife under the fifth section of the dower law. We insist that the statute was intended to apply only to the specific property of the wife remaining undisposed of. Assuming even that there was a trust intended by the parties, there is authority for saying that even a resulting trust to James Luggett could not be proved by parol against the patent after the death of Larkin Cason, the alleged nominal purchaser. (1 Sand. on Uses and Trusts, 354; *Roberts on Frauds*, 99; *Chalk v. Danvers*, 1 Ch. Cas. 310.) The rule that money directed to be laid out in land is considered as land has no application to the fifth section of the dower act.

SCOTT, Judge, delivered the opinion of the court.

We are of the opinion that the facts found by the court do not warrant the judgment. The question involved in this controversy is not, whether the land in part sought to be divided is the separate property of the wife, or whether the

money with which it was purchased was given for her separate use as against purchasers and creditors according to the general principles of law regulating the marital rights of husband and wife; but the case involves the construction of the third section of the act concerning dower of the code of 1845. If a father give his daughter money, though not to her separate use, with which property is purchased by her husband, from the spirit of the section under consideration a use results to the surviving wife, although, as against purchasers and creditors, that property would not be regarded as belonging to her. We regard the section under consideration as intending to give the wife the property which came to the husband by means or in virtue of the marriage. The father never would have given the money but for the marriage. The wife was the meritorious cause of the acquisition of the property. In this sense it may be said that the property came to the husband, in right of the marriage. The object of the statute was to restore to the widow the property undisposed of, which came from her side or family, as there was no issue of the marriage. The plaintiffs here are collateral relations of the husband and have no claim founded in reason or in nature to property acquired by means of his wife, who is a stranger to them. The act of 1849 concerning married women exempted from the payment of the husband's debts property acquired by the wife during the marriage, and which, according to general principles, belonged to the husband. So in the construction of the fourth section of the dower act, it has been twice held by this court that where a female slave is given to the wife, thereby by operation of law becoming the property of the husband, and issue is born of that slave during the marriage, such issue is property coming to the husband in right of his wife by means of the marriage, and the wife will be entitled to the same as dower under that section.

There is no principle on which the argument can be supported that the trust resulted to the father of the defendant as he advanced the money. So soon as the money was receiv-

 Willoughby v. Shipman.

ed it was clothed with a trust for the benefit of the wife. As the husband received the money as a gift to his wife, it became hers under the equity of the dower law ; and if he invested it in other property, a trust would result to her. Nothing is better settled than that resulting trusts are not within the statute of frauds or perjuries.

Reversed and remanded ; Judge Richardson concurs. Judge Napton absent.



WILLOUGHBY *et al.*, Defendants in Error, v. SHIPMAN, Plaintiff in Error.

1. The court ought not, in proceedings instituted under the act concerning mills and mill-dams, to give permission to erect, or increase the altitude of, a dam, if it appear that the mansion-house of any proprietor or other out-houses, curtilages or gardens thereto belonging, or orchard, will be overflowed, or that the health of the neighborhood will be materially affected.
2. A spring-house is an out-house within the meaning of the eighteenth section of said act.

Error to Newton Circuit Court.

E. B. Ewing, (attorney general,) for plaintiff in error.

I. The court erred in "striking out" the issues which had been directed and refusing to order them anew upon defendant's motion. The objections filed upon the return of the inquest, showed good cause for quashing the proceedings and setting aside the verdict. (R. C. 1845, p. 745, § 14 & 15 ; *Payne v. Taylor*, 3 A. K. Marsh. 1168 ; 1 Bibb, 578 ; 4 Ben. Monr. 410 ; 7 id. 450.)

Edwards and *Ewing*, for defendants in error.

I. There is no error in the striking out the issues submitted to the jury. They were improperly submitted by the court and should have been struck out on motion. If the plaintiff in error is damaged he has ample remedy against the defendants by his action at law under the limitations of the twenty-third section of said act. (R. C. 1845, p. 747.)

Willoughby v. Shipman.

RICHARDSON, Judge, delivered the opinion of the court.

The objections filed by the plaintiff in error to the inquest of the jury furnished manifest reasons for framing issues to be tried under the direction of the court; and, if the objections are warranted by the facts, it would be a gross wrong to the plaintiff to impair the value of his property without compensating him with ample damages.

By the first section of the act concerning mills and mill-dams it was the duty of the jury to inquire, 1st, what damage such proprietor would sustain by reason of inundation consequent upon the raising of the dam; 2d, whether the mansion-house of any proprietor, or the out-houses, curtilages or gardens thereto immediately belonging, or orchard, would be overflowed thereby; 3d, whether ordinary navigation and fish of passage would be obstructed; and, 4th, whether the health of the neighborhood would be materially damaged. The inquest returned by the sheriff stated, 1st, that Shipman would be damaged by inundation consequent on raising the dam \$87.12½; 2d, that the mansion-house, out-houses, curtilages, gardens or orchards of no proprietor would be overflowed; 3d, that ordinary navigation and fish of passage would not be obstructed; and, 4th, that the health of the neighborhood would not be materially damaged by raising the dam to the height desired." On the return of the inquisition Shipman filed objections to it, stating that the proposed increase in the height of the dam would seriously affect the health of his residence, would cause the overflow of his spring-house, and destroy the only spring on his place. Thereupon issues were made up to be tried as the statute directs, (secs. 14 & 15,) but after a jury had been empanelled and sworn the court ordered the issue to be stricken out and made an order granting the prayer of the petitioner.

This ruling of the court is only defended on the ground that Shipman had a remedy for any injury he might sustain by raising of the dam by action against the petitioners, and the twenty-third section of the act is cited to support that view.

Willoughby v. Shipman.

But it will be observed, on looking at that section, that the verdict of the jury is final and conclusive on all parties as to "such injuries as were actually foreseen and estimated by that jury." A spring-house is embraced in the term out-houses, and as the jury returned that no out-houses would be overflowed, Shipman might recover for any injury to his spring-house on the ground that such injury had not been foreseen or estimated by the jury. But as all the other injuries, which he charged would result from increasing the height of the dam, were embraced in the first and fourth heads of the verdict, it could be insisted that they "were actually foreseen and estimated by the jury," and therefore for such injuries he could not recover in an independent action.

The court ought not to give permission to erect or increase the altitude of a dam if it appear that the mansion-house of any proprietor, or the out-houses, curtilages or gardens there-to belonging, or orchard, will be overflowed, or that the health of the neighborhood will be materially affected (sec. 18); and the public necessity for the erection of a mill ought to be very apparent to justify a court in inflicting injury on any person. A never-failing spring of pure water is invaluable to the health and comfort of a family, and should not be destroyed by the sanction of a court unless the paramount necessities of the public for a mill demand the sacrifice.

The court of appeals of Kentucky said that where the public good is not concerned, a private injury of that kind was an insuperable objection to the erection of a mill. (*Morgan v. Bonta*, 1 Bibb, 579; *Payne v. Taylor*, 3 A. K. Marsh. 328.)

The judgment will be reversed and the cause remanded; Judge Scott concurring. Judge Napton absent.

HARRIS v. BUFFINGTON, Auditor of Public Accounts.

1. The fees of the clerks of the county courts for services rendered by them under the revenue act of Nov. 23, 1857, (Sess. Acts, Adj. Sess. 1857, p. 75,) are regulated by that act and not by the act of 1855 concerning fees. The clerks are entitled to receive five cents per hundred words and figures for making out and copying the tax books, abstract books, lists and all papers required to be copied or made out under said act of Nov. 23, 1857.

Petition for Mandamus.

This was an application to the supreme court in behalf of the clerk of the Callaway county court for a mandamus directed to the auditor of public accounts requiring him to audit a claim of said clerk to fees for certain services rendered by him under the revenue act of November 23, 1857, and to issue his warrant on the treasurer. The clerk claimed fees at the rate of ten cents per hundred words for copies of the tax books; the auditor was willing to allow five cents per hundred words and figures.

Harden, for the complainant.

Ewing, (attorney general,) for the auditor.

RICHARDSON, Judge, delivered the opinion of the court.

The only question in this case is whether the compensation to the clerks of the several county courts for services rendered by them under the revenue act of 1857 is regulated by that act or by the act concerning "fees" of 1855.

The present revenue law is evidently designed to be complete within itself. It purports to cover the whole ground and seems to be provided with all the machinery necessary for its execution. New duties are imposed on the clerks not contemplated by previous acts and for which no compensation was allowed by the old law, but the comprehensive language of the sixth section of the seventh article prescribes the compensation for all the work of every kind whatever to be performed by the clerks, and without it the law would manifestly be incomplete. That section is as follows: "§ 6.

Davis v. Farmer.

The county clerk shall receive five cents per hundred words and figures for making out and copying the tax books, abstract books, lists and all papers required to be copied or made out under this act."

The only doubt on the subject is suggested by the caption to the seventh article, which would indicate that its provisions were only designed to affect St. Louis county.

The first four sections, which take up nearly the whole space covered by the seventh article, certainly have only a local application, but the fifth section directs the secretary of state to cause the act to be published in pamphlet form and to forward twenty copies thereof to each of the county court clerks in the state; and as this is a general provision though placed under a local head, the scope of the sixth section ought not to be determined alone by its location. If provision was made elsewhere in the act regulating the compensation of the clerks, it would be proper to construe the sixth section as applying only to the clerk in St. Louis county; but as that is the only section that touches the subject and prescribes the fees for services not embraced in former laws, we think it was intended to apply to all the county court clerks in the state.

The mandamus will be refused; Judge Scott concurring. Judge Napton absent.



DAVIS, Plaintiff in Error, v. FARMER, Defendant in Error.

1. Where the plaintiff in a suit gives security for costs and the defendant prevails in the action, judgment may be rendered at the same time against the surety; should however judgment for costs against the surety be omitted, the defendant may sue the surety directly on his undertaking.
2. The plaintiff in a suit gave security for costs by an instrument in the following form: "I. S. v. N. A. D. Civil action. We, I. S. as principal, and W. B. F. and B. S. L. as sureties, are held and firmly bound for the payment of all the costs that have accrued or may accrue in the above case. Witness our," &c. *Held*, judgment having been rendered against the plaintiff for costs, that suit might be maintained on this instrument by the defendant against the sureties.

Davis v. Farmer.

Error to Greene Circuit Court.

This was an action by N. A. Davis against W. B. Farmer on the following instrument: "Isham Shoat v. N. A. Davis. Civil action in the Greene circuit court. We, Isham Shoat as principal, and W. B. Farmer and B. S. Lane as sureties, are held and firmly bound for the payment of all the costs that have accrued or may accrue in the above case. Witness our hands and seals this 23d of June, 1852. [Signed,] Isham Shoat (seal), W. B. Farmer (seal), B. S. Lane (seal)." The petition alleged that the above instrument was executed during the pendency in the Greene circuit court of a suit in which said Shoat was plaintiff and said N. A. Davis defendant, and that the defendant prevailed in said suit and recovered costs against the plaintiff therein, Shoat. To this petition the court sustained a demurrer.

Wright, for plaintiff in error.

I. The guarantee to pay costs is in the language of the statute, and is sufficient to make the defendant liable to pay all costs which Davis may have paid or is liable to pay in the suit in which said undertaking was filed.

Hendrick, for defendant in error.

RICHARDSON, Judge, delivered the opinion of the court.

It was decided in *Hamilton v. Moody*, 21 Mo. 79, that when the plaintiff gives security for costs and the defendant prevails in the action, judgment for costs may be rendered at the same time against the surety. This is the most convenient practice and ought to be universally adopted; but if it should be omitted, there is no reason why the surety should escape liability on his undertaking.

The instrument declared on in this suit strikes the legal mind as anomalous in omitting to name an object, but it seems to be recognized by the statute as in proper form, (R. C. 1855, p. 441, § 2,) and is according to the form often used. (See R. C. 1855, p. 1626, Appendix, No. 46.) The

McManus v. Jackson.

apparent intention of the legislature would be defeated by applying technical rules to such instruments, and hence to give them effect it is necessary to construe the defendant in the suit in which the obligation is filed as the obligee, and to allow him, in the event that the plaintiff is condemned to pay the costs, to maintain an action in his own name for all the costs which the plaintiff is bound to secure.

The judgment will be reversed and the cause remanded ; Judge Scott concurring. Judge Napton absent.



McMANUS, Plaintiff in Error, v. JACKSON, Defendant in Error.

1. Where the slanderous words charged in a petition are not actionable in themselves, it is necessary to set forth, by way of inducement, those extrinsic facts and circumstances which make them actionable.
2. It is not actionable to charge a person with swearing a lie unless it is shown by proper averments that the plaintiff was sworn as a witness in a judicial proceeding, and that the speaking of the offensive words had reference to such proceeding.
3. It is not actionable to charge a person with giving a free pass to a negro, unless it be averred that the negro referred to was a slave ; nor, if it be averred that the negro referred to was a slave, would such words be actionable unless it be also averred that the negro did not belong to plaintiff.

Error to Bates Circuit Court.

This was an action to recover damages for slanderous words spoken of the plaintiff. The petition contains three counts. The first count states that at a certain specified time the plaintiff was road overseer ; that as such he notified the hands in his district to work the roads ; that among the persons so notified were persons in the employ of the defendant ; that the latter refused and failed to work on the road as the law directs ; that the plaintiff returned a list of the persons so refusing to a justice of the peace to be dealt with according to law ; that it became and was material for said justice to inquire whether said hands had any lawful excuse for fail-

McManus v. Jackson.

ing and refusing to work said road; that the defendant in the hearing, &c., "of and concerning the character of plaintiff, and of and concerning the supposed oath of plaintiff on this said trial and litigation before said Justice Lewis Speece aforesaid, maliciously spoke and published of and concerning plaintiff, and of and and concerning the supposed oath of plaintiff, the following false, slanderous and defamatory words following, to-wit: 'he (meaning plaintiff) swore a lie'—'Lawrence McManus (meaning plaintiff) had sworn a lie'—&c., &c., then and there and thereby meaning, and was so understood by the citizens, to charge plaintiff with the crime of perjury," &c.

The slanderous words charged in the second count are: "he (meaning plaintiff) once gave a negro a free pass"—"I wonder if he is not the same man who once gave a negro a free pass." It was not averred that the negro was a slave. In the third count the words charged are similar to those charged in the second, and the negro referred to is averred to have been a slave, but it is not averred that he did not belong to the plaintiff.

The court sustained a demurrer to the petition.

Freeman and Wright, for appellant.

I. In actions of slander the general criterion as to whether words are actionable in themselves is, that the words alleged to have been spoken, if true, would subject the party charged therewith to a criminal prosecution and for which corporal punishment might be inflicted. (26 Mo. 160.) But this is not an infallible rule; thus, to charge a person with a felony barred by the statute of limitations, or with an offence committed beyond the limits of this state, would be actionable, although in neither case could the party charged be punished in this state, and in the former in no state or place. (*Johnson v. Jackson*, 25 Mo. 583.) By our statute any voluntary corrupt oath taken before any officer authorized to administer oaths is indictable and the punishment corporal and disgraceful. (R. C. 1855, p. 600, § 4.) The words as

McManus v. Jackson.

charged in the petition are actionable in themselves, for, if true, they would subject the plaintiff to a criminal prosecution and ignominious as well as corporal punishment. (5 Johns. 188; 13 Johns. 124, 274; 6 Wend. 76; 8 Pick. 384-5; 20 Mo. 330-37; 8 B. Monr. 525.) The second and third counts are sufficient, and the court erred in sustaining the demurrer to these counts.

Bryant and Peyton, for defendant in error.

I. The circuit court did right in sustaining the demurrer to both the original and amended petitions, 1st, because the words of the petition as charged are not in themselves actionable unless made so by such averments as would show that the crime imputed to plaintiff was such as, if true, would have subjected the plaintiff to a criminal prosecution; nor does the petition aver that any oath whatever had been administered to plaintiff. There was no colloquium in the petition, consequently it is bad. (See *Harris v. Woody*, 9 Mo. 112; *Palmer v. Hunter*, 8 Mo. 512; *Puselly v. Bacon*, 20 Mo. 330.)

The second and third counts are too vague, general and uncertain, and charge no offence distinct and liable to punishment. It has been decided by our courts, and is now the law, that an amended petition takes the place of the original one and must set forth the true cause of action; and the same decision has been made on the New York code.

RICHARDSON, Judge, delivered the opinion of the court.

When the slanderous words used in the petition are actionable of themselves, it is not necessary to make any prefatory averments as to the circumstances to which they refer; but if the words do not *per se* convey the meaning which the plaintiff would assign to them, the petition must contain a statement of the extrinsic matter necessary to show that they are actionable, and whatever is necessary to be stated for that purpose must be proved. (1 Chitty Plead. 429; 2 Greenl. Ev. § 413; 1 Stark. Ev. 460.)

It is well settled that it is not actionable to charge a per-

McManus v. Jackson.

son with swearing a lie, unless the petition shows that the speaking of the offensive words had reference to a judicial proceeding. (Harris v. Woody, 9 Mo. 112.) The reason is that the words standing alone do not impute a crime, for a man may swear falsely without even having taken an oath in any court or before any officer authorized to administer one. Such words however may be rendered actionable, if by way of *inducement* it is set out that there had been a trial or other proceeding in which the plaintiff was sworn as a witness, and that the defendant in using the offensive words referred to such matter and intended to charge the plaintiff with the crime of perjury. The decision in Puselly v. Bacon, 20 Mo. 330, is not in conflict with this well established rule, because, as it was held that the words in that case were actionable *per se*, a prefatory statement of extrinsic facts was unnecessary.

The plaintiff in the first count of the amended petition recognized the propriety of connecting the slanderous words with other matter to show their point, but he omitted to aver that the plaintiff had been sworn as a witness, and in that respect he failed to state a fact material to a cause of action.

The second count is defective because it is not averred that the negro was a slave, to whom the plaintiff was charged with having given a free pass; and though the third count alleges that the defendant intended to charge the plaintiff with having given a free pass to a slave, it omits to state that the slave did not belong to the plaintiff.

At common law, when it did not appear, from the words themselves, to whom they were intended to apply, it was necessary by the aid of a colloquium to show that they applied to the plaintiff. But this rule has been changed by our statute, which declares that "in an action for libel or slander, it shall not be necessary to state in the petition any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose, but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff; and

Gillinwaters v. Gillinwaters.

if such allegation be not controverted in the answer it shall not be necessary to prove it on the trial ; in other cases it shall be necessary." (R. C. 1855, p. 1240, § 55.) That section has however a limited operation, for though it dispenses with the necessity of showing by extrinsic facts the application of the words to the plaintiff, it is still necessary when the words are not actionable, to show their meaning by proper averments in the inducement. (5 How. Pract. 174 ; 6 id. 99 ; Fry v. Bennett, 5 Sand. 54.) The demurrer was properly sustained and the judgment will be affirmed ; Judge Scott concurs. Judge Napton absent.

—♦♦♦—

GILLINWATERS, Plaintiff in Error, v. GILLINWATERS, Defendant in Error.

1. The conduct of a husband toward a wife may be such as to warrant her in leaving him, although it would not entitle her to a divorce ; if her absence be caused by his misconduct, or if he place himself in such a situation as to prevent her return, he will not be entitled to a divorce, although she may have lived separate from him for a number of years.

Error to Cass Circuit Court.

Bryant and Peyton, for plaintiff in error.

Chrisman & Comingo, for defendant in error.

SCOTT, Judge, delivered the opinion of the court.

Nothing is seen in the circumstances of this case which should induce a court to separate the plaintiff and defendant as husband and wife. The ground on which the dissolution of the marriage is sought is the alleged absence or desertion of the wife. Although the wife has lived separate from her husband for a number of years, yet her absence may have been caused by his conduct. Having disposed of all of his property, without a house or home, being a mere boarder in another family, he can not complain that his wife has ab-

Gillinwaters v. Gillinwaters.

sented herself and will not return. Let him first provide a place to which she can return. The disposition of his property seems to have been made with a view to effect the very object he has attained and of which he now complains, and for which he would have a divorce. Although the wife may have acted improperly in leaving home when she did, yet that did not justify the husband in putting himself in a situation which prevented her return. The married state is not a state of war which will, for any the slightest fault by one party, justify the other in carrying measures to an extreme. Marriages are not made to be dissolved. Some of the most cherished interests of society are involved in the preservation of the marriage tie. It would be impossible to maintain the peace of families if every quarrel should lead to a divorce. Married parties must bear and forbear. For specific causes the married state may be destroyed, but he or she who is instrumental in producing the cause for a divorce can never avail himself or herself of it. If a wife voluntarily leave her husband and she is guilty of no wrong to him, and afterwards offers to return and he causelessly refuses to take her back, he will be liable for necessities furnished her after such refusal. The conduct of a husband toward his wife may be such as would warrant her in leaving him, although it would not entitle her to a divorce. The plaintiff would excuse or palliate all his declarations on the ground of heat, passion or indiscretion, and yet has not the charity to attribute those of his wife to like causes. He would hold to the assertion she made that she would not return, and make that a pretext for disposing of his home so as to prevent her doing so. It is clear that the plaintiff was as anxious for a separation as the defendant, and the little arts he practiced in the hope of keeping the law on his side serve only to evince his real desire. The record does not show that he is an innocent and injured party, and therefore he can not be divorced.

Judgment affirmed; Judge Richardson concurs. Judge Napton absent.

Stewart v. Brooks.

STEWART *et al.*, Defendants in Error, v. BROOKS, Plaintiff in Error.

1. The provisions of the act of February 13, 1847, (Sess. Acts, 1847, p. 122, § 31, 32, incorporated into the revised code of 1855, R. C. 1855, p. 1360, § 35, 36,) in so far as they regulate the redemption by minors of land sold for taxes, are complete in themselves and do not need the aid of the act of 1845. (R. C. 1845, p. 951, § 14.)
2. To entitle a minor to redeem lands sold for taxes, as provided by sections 31 and 32 of the act of February 13, 1847, and by sections 35 and 36 of the revenue act of December 13, 1855, he must pay to the purchaser at the tax sale double the amount of all the taxes and costs paid by him at the time of his purchase, together with fifteen per cent. per annum upon this amount from the date of the tax deed; he shall also refund to the purchaser the amount of taxes paid by him after the date of his purchase, together with interest thereon at the rate of six per cent. per annum from the times of payment respectively, whether before or after the date of the tax deed.

Error to Moniteau Circuit Court.

On the 1st Monday in October, 1852, the defendant purchased a certain tract of land, at a sale of land for taxes in Moniteau county. The lands were sold for the taxes for the years 1849, 1850 and 1851, assessed against the said tract as the property of W. S. Garner, deceased. The defendant obtained a deed from the register of lands dated May 8, 1855. Both the parties in whose behalf this proceeding is instituted were at the date of the defendant's purchase minors. One attained her majority in the year 1856; the other has not yet attained her majority. The present proceeding was instituted on the 30th of September, 1858, to obtain a redemption of said tract of land. The only matter in contest is the rule to be adopted in ascertaining the amount to be paid or refunded by the plaintiffs to entitle them to redeem. The court directed that the plaintiffs should pay into court double the amount of the taxes and costs paid by defendant up to the date of his tax deed, together with interest at the rate of fifteen per cent. per annum from the date of the deed. The court refused to order the plaintiffs to refund the taxes paid after the date of the tax deed.

Stewart v. Brooks.

White, for plaintiff in error.

Parsons, for defendants in error.

I. The act of 1847 intended that the purchaser should receive back from the party entitled to redeem double the amount of taxes, costs, &c., incurred up to the date of the deed and fifteen per cent. on that amount to the date of redemption. The act does not provide for the payment of double the amount of taxes, costs, &c., incurred after the date of the deed, but only for the fifteen per cent. on the amount incurred prior to the date of the deed. This the court allowed, and therefore committed no error in refusing to allow double taxes and costs accruing subsequent to the date of the deed.

SCOTT, Judge, delivered the opinion of the court.

The act of 1847 amendatory of an act entitled "An act to provide for levying, assessing and collecting the revenue," approved March 27, 1847 (Sess. Acts, 1847, p. 117), repeals all acts and parts of acts inconsistent therewith. The provisions of the act of 1847 in relation to the redemption of lands sold for taxes differ in some respects from those contained in the act of 1845 to provide for levying, assessing and collecting the revenue. (R. C. 1845, p. 947.) Where there is such conflict the prior law must give way. The act of 1847 on the subject of the redemption of lands is complete within itself and does not need the aid of the act of 1845. The expression of one thing is the exclusion of another, and the 31st section of the act of 1847, by prescribing the terms on which minors might redeem their lands when they had been sold for the taxes, necessarily excluded any term or condition not therein contained.

In proceeding on the petition to redeem provided for by the thirty-second section of the act of 1847, the circuit courts are directed to be governed "by the principles and practices of courts of chancery." It is a well settled rule of equity that he who wants equity must do equity; and upon this rule if a mortgagee has two debts due from the same debtor,

Stewart v. Brooks.

one of which is secured by a mortgage and the other is not, the mortgagor will not be permitted to redeem without first satisfying both debts. A mortgage given as a counter security to a joint obligor, shall stand as a security for a second joint bond entered into by the same persons afterwards, without any agreement for that purpose, and the heir shall not redeem without saving harmless as to both. (Fonb. Eq. book 3, chap. 1, § 9.) This proceeding affirms the validity of the sale made to the defendants. If the sale was valid, he was then rightfully the owner of the land and was bound to pay the taxes assessed upon it, which the law made a lien, and it would be a great hardship if, while the validity of the sale is affirmed, the purchaser should be compelled to yield up his purchase without receiving the taxes which he had been obliged to pay and for which the plaintiffs themselves would have been liable had not their land been sold. This is not like the case where land has been sold for taxes and the original owner sues in ejectment and recovers it. Such a proceeding disaffirms the legality of the sale, and the judgment is based on its nullity for the want of conformity to law in the proceedings. The purchaser acquiring no title by his purchase, he would pay the taxes without any right, and is in the situation of any other person who voluntarily and without any authority pays money for another. The fact that the plaintiffs were minors can not affect the question. The land of minors is subject to taxation as well as that of adults. As the defendant has lawfully paid the taxes which the plaintiffs would have been compelled to pay had they remained the owners, "the principles and practices of a court of chancery" forbid that they should be allowed to redeem without first indemnifying the defendant for the legal charges to which he has been subjected by reason of his purchase.

We do not find any provision in the act of 1847 which would warrant us in allowing more than the legal rate of interest on the several amounts paid for taxes, to be computed from the times of payment respectively. This of course is to be understood of the taxes paid after the purchase. It would

Young v. Smith.

be an arbitrary construction of the thirty-first section of the act to hold it to apply only to taxes paid before the date of the deed. We consider that section as only applying to the taxes for which the land was sold. This view seems to be confirmed by the twenty-third section of the act of 1847, which, in authorizing a redemption of land sold for taxes, makes no provision for the refunding of taxes paid by the purchaser subsequently to the sale. The taxes paid after the sale and before the execution of the deed would not be stated in it, and there is no reason why those paid after the date of the deed should not be refunded as well as those paid after the sale and before its execution. In fixing the date of the deed as the period from which the fifteen per cent. per annum was to be calculated, it must have been intended that the deed would show the amount on which the penalty was given. The ground on which we base the right of the purchaser to the return of the taxes paid after the sale is the provision in the thirty-second section of the act, which requires the circuit courts, in proceedings of this nature, to be governed by "the principles and practices of courts of chancery."

Upon the whole, our opinion is, that the plaintiffs are entitled to redeem upon the payment of double the amount of taxes and costs incurred by the purchaser by reason of his purchase, with fifteen per cent. per annum thereon from the date of the deed, and by refunding the amount of taxes paid by the purchaser since the sale, with six per cent. interest thereon from the times of payment respectively.

Reversed and remanded; Judge Richardson concurs. Judge Napton absent.



YOUNG, Defendant in Error, v. SMITH, Plaintiff in Error.

1. Where a tenant, after the termination of the time for which the premises are demised to him, willfully holds over, no demand in writing is necessary to enable the landlord to maintain an action for unlawful detainer against him.

Young v. Smith.

2. Where the term of a tenant is to end at a time certain, no notice to quit is necessary, whether the term is for less or more than a year.
3. To authorize the maintenance of an action for unlawful detainer, it is not necessary that the plaintiff should have been in the possession of the premises; a grantee can maintain such action if his grantor could.

Error to Jackson Circuit Court.

This was an action for an unlawful detainer. The plaintiff adduced in evidence an instrument in writing, dated September 16, 1857, by which it was stipulated, among other things, that Smith, the defendant in this suit, "is to retain the occupancy of the house and grounds now in his possession and rented heretofore from John Lewis, until the first day of January next, at which time the rents, &c., * * * * It is understood that said Smith is to give the said Young peaceable possession of the said premises without delay on the first of January, 1859." Upon this instrument, with proof of possession on the part of defendant, and of the value of the use and occupation, the plaintiff relied to support the action. The defendant offered to prove that he leased the premises from one John Lewis for one year from January 1, 1857. The court excluded the evidence. There was evidence bearing upon the existence of an agreement subsequent to January 1, 1858, for a prolonged occupancy on the part of Smith. The court refused the following instructions asked by defendant: "1. Unless the jury believe from the evidence that plaintiff before the commencement of this suit made a demand in writing for the possession of the premises in dispute from defendant, they should find for the defendant. 2. The agreement in writing between the parties does not show that Smith leased the premises from the plaintiff; and unless the jury believe from the evidence that Smith did lease the premises from plaintiff, they should find for defendant, although they may believe that Hiram Young is the legal owner thereof. 4. Unless the jury believe from the evidence that before the commencement of this suit plaintiff had possession of the premises in controversy, they will find for the defendant." The jury found for the plaintiff.

Ewing, (attorney general,) for plaintiff in error.

I. The court erred in excluding evidence of a lease of the premises from Lewis to defendant. If there was such lease either for a definite time or at will, plaintiff could acquire no right of action or of possession under the agreement read in evidence.

II. There was no evidence in writing by plaintiff for the possession of the premises prior to the commencement of the suit, and the court therefore erred in refusing the first instruction asked by defendant. (R. C. 1855, p. 787, § 3.)

III. If the agreement in evidence was a lease, it being for less than one year, defendant was entitled to one month's notice to quit, and the second instruction given for plaintiff was wrong. (R. C. 1855, p. 1912, § 13.) This notice is necessary in all cases of a tenancy at will, sufferance, or for less than one year. Notice is dispensed with where the term is to end at a certain time, if it exceeds a year. (R. C. 1855, p. 1011, § 13, 14.)

IV. The agreement was an attornment to a stranger, can not affect the possession of the landlord, Lewis, and is void, a nullity. (R. C. 1855, p. 1013, § 15.) If defendant originally entered under the title of Lewis, the taking a lease from plaintiff was a fraudulent attornment, by which Lewis, the lessor, can not be prejudiced. It was an absolute nullity, and did not create the relation of landlord and tenant. (*Jackson v. Harper*, 5 Wend. 249.) Whether the instrument in evidence is a lease or an attornment, defendant might have disputed plaintiff's title if there was a subsisting lease with Lewis when it was entered into, and it is no infringement of the rule that a tenant shall not dispute the landlord's title. (*Cornish v. Seavell*, 8 Barn. & Cres. 475; *Blue v. Sayre*, 2 Dana, 213.) Plaintiff never having had possession of the premises, and not being the vendor or assignee of the landlord Lewis, nor holding title otherwise from or under him, can not maintain this action of forcible entry and detainer. (R. C. 1855, p. 794, § 36, 37, 38; *Holland v. Reed*, 11 Mo. 605.)

Young v. Smith.

Ryland & Son, for defendant in error.

I. By the agreement read in evidence, the defendant Smith acknowledged Young as his landlord, and by said agreement fixed the time to surrender the possession of the premises to the plaintiff. This time was agreed upon and consequently the renting or occupancy was to expire at a stated day, and no notice was necessary requiring the defendant to quit. (R. C. 1855, p. 1012, § 14.) The agreement read in evidence was a clear and plain acknowledgment by defendant of the plaintiff as his landlord, and consequently the evidence offered by defendant showing that he had previously rented the premises of John Lewis, was irrelevant, and offered nothing by way of defence to the plaintiff's action and was properly excluded. The testimony on the part of the defendant tending to show that he had made a subsequent agreement with plaintiff to the one read in evidence, was, under proper instructions, left with the jury, and their verdict shows that there was no such agreement.

Scott, Judge, delivered the opinion of the court.

The third section of the act concerning forcible entry and detainer describes two modes by which the wrong of an unlawful detainer may be committed. To entitle a plaintiff to remedy for an unlawful detainer in the manner first mentioned in that section, no demand in writing is necessary. If the tenant holds over the premises after the termination of the time for which they were demised or let to him, he is subject to a suit for an unlawful detainer without any demand in writing for the delivery of the possession. This is evident from the words of the statute. A demand in writing is only necessary when any person wrongfully and without force shall obtain and continue in possession of the lands of another.

We do not see what a lease from Lewis to the defendant has to do with the case, as he acknowledged the plaintiff to be his landlord. There was no evidence given or offered that

Young v. Smith.

Lewis denied the right of the plaintiff. On the contrary, the circumstances raise a strong presumption of a conveyance or sale of the premises by Lewis to Young, the plaintiff, and there is no pretence that there was any misrepresentation on the part of the plaintiff. There is no foundation in the evidence for the application of the law relative to the attornment by a tenant to a stranger. So far from it, the case furnishes an instance in which the rule is applicable, that a tenant can not dispute the title of his landlord. (*Hall v. Butler*, 2 Perry & Dav. 374; 10 Adol. & Ellis, 204.)

When the term of a lease is to end on a precise day, there is no occasion for a notice to quit previously to bringing an ejectment, because both parties are equally apprised of the determination of the term. (*Cobb v. Stoke*, 8 East. 358.) In this case the lease was for a less term than one year. (*Messenger v. Armstrong*, 4 Term, 54; *ib.* 162.) Although the thirteenth section of the act concerning landlord and tenant, among other tenancies, allows a tenancy for less than one year to be terminated by a month's notice to quit, yet the section immediately succeeding enacts that no notice to quit shall be necessary to or from a tenant whose term is to end at a certain time, or where by agreement notice is dispensed with. This is nothing but a principle of common law, and it is applicable to all tenancies without regard to their duration.

The doctrine of the case of *Reed v. Holland*, 11 Mo. 605, and others like it, that he only who has been in possession of land can maintain a suit for a forcible entry and detainer or of unlawful detainer, was changed at the last revision; (*R. C.* 1855, p. 794, § 36;) and now heirs, devisees, grantees and assigns may have these remedies.

Judgment affirmed; Judge Richardson concurring. Judge Napton absent.

Powell v. McAshan.

POWELL *et al*, Appellants, v. McASHAN *et al*, Respondents.*

1. By the general law, if a tenant make erections and improvements upon the leased land and so connect the same with buildings already erected that they can not be separated or removed without material injury to the landlord's property, such erections or structures will be deemed in law fixtures as against such tenant, and he can not remove the same.
2. An agreement on the part of the landlord, that the tenant may take off and carry away any and all buildings, sheds and other temporary houses and improvements he may erect, would not be construed to authorize the taking away of erections, the removal of which would cause material injury to the property of the landlord.
3. Such an agreement on the part of the landlord would be valid although oral; it would not be within the statute of frauds.

Appeal from Buchanan Court of Common Pleas.

This was an action to recover the value of a building and shed alleged to have been wrongfully detached and removed from a certain main building on a lot belonging to the plaintiffs. The facts as they appeared in evidence are substantially as follows: The lot belonged to the heirs of one Peter Powell. At a sale in partition among said heirs on the 30th of March, 1855, the said lot was sold and the plaintiffs became the purchasers. On the 10th of April the plaintiffs notified the defendants to quit the possession. The defendants did not surrender the premises until June. Before doing so they removed the building and shed spoken of in the petition. This building and shed were erected by one McGhee, who had leased the lot and main building of the heirs of Powell. It was agreed orally that McGhee should have the right to take off and carry away any and all buildings, sheds and other temporary houses and improvements which he might erect. McGhee sold out his improvements and erections to the defendants, and leased the premises to them. The testimony bearing upon the question whether the building and shed were structures of a temporary, or of a permanent character—whether their removal would or would not

* This cause was submitted at the July term, 1858.—[REP.]

Powell v. McAshan.

materially injure the main building, was conflicting. The instructions given and refused are numerous.

Gardenhire, for appellants.

I. The improvements were fixtures. Defendants had no right to remove them. (2 Kent, 343; 20 Johns. 29; Gibbons on Fixtures, 38; 7 Taunt. 188; Phillipson v. Mullanphy, 1 Mo. 442.) Admitting that the buildings were temporary and not fixtures, defendants had no right to remove them after the expiration of their term. They admit that they were notified to quit the possession of said lot on the 10th day of April, and they made no objections to the form or sufficiency of the notice. They virtually acknowledged that their lease had expired. They had the right of removal, if at all, under the agreement with Hovey. That agreement did not give them this right. The court erred in refusing the instructions asked by plaintiffs, and in giving those asked by defendant.

Loan, for respondents.

I. The defendants not being parties to the suit for partition between Powell's heirs, are not bound by the judgment. If the contract made by Hovey as agent for Powell's heirs with McGhee is valid under the law, the plaintiffs are bound by it and the instructions No. 7, 8, 9, 10, 11 and 12 were properly refused as they contain only abstract principles of law not affecting this case, and the instructions given on the part of the defendants were proper. The contract is valid. (5 Johns. 5.) If the contract made by Hovey as agent as aforesaid with McGhee is not valid so far as it relates to improvements made by McGhee, yet the said McGhee or his assigns while in the lawful possession of said premises have the right to remove all improvements made by them that will not cause permanent injury to the freehold. (9 Mo. 360.)

NAPTON, Judge, delivered the opinion of the court.

The inclination of courts has been, of late years, to consider every erection upon land by a tenant, for manufactur-

Powell v. McAshan.

ing or commercial purposes, which can be removed without injury to the owner of the land, as a personal chattel, belonging to the tenant and removable by him at any time previous to his surrender of the premises. The law was not in ancient times so liberal to the tenant, and many nice questions arose as to what degree or character of connection between the chattel and the land should make the one an inseparable part of the other. The question now is, not whether the building is secured to the ground by posts of wood or by mason-work of rock or brick; nor whether it is attached to the ground by either of these modes or merely set upon blocks or rollers, but the question is simply for what purpose it is erected, and whether its removal will leave the land in the same condition it was in when rented. If the building is erected for trade or manufacture, and can be removed without injury to other buildings already on the ground, the tenant may remove it, and the landlord has no ground for complaint.

The term "fixture" has been employed in so many different senses as to create some confusion. It has been sometimes used to designate such personal chattels as were so *fixed* to the land that their removal would prejudice the owner of the land, and would not therefore be permissible either to the tenant or vendor. Frequently, however, the same term is applied to such erections as may be removed by a tenant, but would still pass by a sale and could not be removed by the vendor. The present is a case of landlord and tenant, and the distinction is unimportant to its decision.

There was also an express contract in this case between the landlord and tenant, authorizing the latter to put up additional sheds and other temporary buildings for warehouses and to remove them when his term expired. It is true this contract was by parol, but it is not the less valid on that account. It was not a contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them. (Frear v. Hardenburgh, 5 John. 273.)

There was no question in this case as to the right of re-

Powell v. McAshan.

moval subsequent to the expiration of the tenancy. The buildings were removed before the premises were surrendered to the owners. Whether the premises were held longer than the contract of lease authorized, and what rights and remedies accrued by reason of such holding over, are matters nowise connected with the present suit, and the instructions asked upon this point were with propriety refused.

There was, however, one question of fact upon which instructions were asked, which was not submitted to the jury. If improvements or erections are so connected with the buildings already upon the leased premises that they can not be separated without material injury to the landlord's property, they ought not to be removed. This is so by the general law without reference to any contract, and a reasonable interpretation of the contract proved in this case would tend to the same inference. In such cases the property is not left in the same condition in which it is found. If a stranger so mixes up his property with mine that it can not be separated without destroying or materially injuring mine, upon well settled principles of law and justice he must lose his property. This question ought to have been left to the jury. The witnesses differed about it, and although we might readily determine it here satisfactorily to ourselves, the plaintiffs had a right to the opinion of the jury.

Judgment reversed and cause remanded ; Judge Richardson concurring.

SCOTT, Judge, dissenting. As the defendant had by contract the right to remove the improvements he made on the lot, he was authorized in removing the materials he placed on it. If any injury was done to the plaintiffs' structure, that injury must have been done in making the improvement, not in removing it. The parties interested acquiesced in the improvements as made, and did not complain that in removing the materials their house must necessarily be injured. They should have objected at the proper time. If the defendant in removing his materials, as by contract he had a right to do,

Thornton v. Thornton.

did an injury to the plaintiffs' property, he was entitled to damages for such injury. The law in relation to fixtures has nothing to do with the case: it rests on contract entirely. As the defendant would only rent on condition that he should remove his materials, it is not to be supposed that he intended to give them away in making his improvements. Judging from the character of the structure on the lot, no question can arise as to the length a tenant, with the right to remove the improvements made on the demised premises during the tenancy, would be permitted to go in removing the materials of an improvement made on a valuable building and which could not be taken away without great injury to the landlord. In such cases a presumption might arise that the improvement was made for the convenience of the tenant without any intention of removing the materials of which it was composed. But in such a case a party, I imagine, would not resort to an action of trover for the materials. The very form of this action negatives the idea that there was any room for the application of any such principle in the suit now before the court.

I am in favor of affirming the judgment.



THORNTON, Plaintiff in Error, v. THORNTON, Defendant in Error.

1. Case affirmed.

Error to Henry Circuit Court.

Wright, for plaintiff in error.

I. A divorce should have been granted on the evidence. (Bishop on Marriage and Divorce, 442; Burgess v. Burgess, 4 Eng. Eccl. R. 312, 527; 4 Barb. 217.) Defendant was at least entitled to maintenance for a reasonable time.

Ryland & Son and *Freeman*, for defendant in error.

Ashburn v. Ayres.

I. The testimony makes out no case against defendant. (26 Mo. 355; 13 Mo. 308; 24 Mo. 97.)

SCOTT, Judge, delivered the opinion of the court.

We have examined the record in this case. No question of law is presented for our determination; neither branch of the case is at all supported by the evidence—that for the divorce, nor that for alimony. The statement of the evidence, as preserved in the record, is a full vindication of the judgment of the court, and it is of such a character that it needs no argument or comment to show that it warrants the decree. Its bare statement is sufficient to satisfy the mind that the case made in the petition is not sustained, and we deem it unnecessary to set it out as it could serve no useful purpose. Affirmed; Judge Richardson concurs. Judge Napton absent.

ASHBURN, Respondent, v. AYRES *et al.*, Appellants.

1. The Kansas court of common pleas has no jurisdiction of actions to enforce mechanics' liens.
2. Where a material man institutes proceedings to enforce a lien against the contractor and the owner of the building, and dismisses the same as to the original debtor, the contractor, the proceeding must also be dismissed as to the owner of the building, there being no party on the record to defend the suit.

Appeal from Kansas Court of Common Pleas.

Ewing, for appellant.

I. The circuit court has exclusive jurisdiction of actions to enforce mechanics' liens. (R. C. 1855, p. 1065; Gaty v. Brown, 11 Mo. 140.) But if the Kansas common pleas has jurisdiction of the subject matter, it does not so appear from any thing averred in the petition. Its jurisdiction is limited to the township of Kaw; (Sess. Acts, 1855, p. 60, § 1 & 19;) and it is not shown by averment that the building is within

Ashburn v. Ayres.

the township. Nothing is to be presumed in favor of the jurisdiction of that court.

II. Plaintiff having dismissed the suit as to Ayres, there was no party to the record who could defend the suit. The contractor is the only person who can contest the validity of the demand, and there could be no judgment against Bryant, the proprietor of the building. (*Wibbing v. Powers*, 25 Mo. 600.)

SCOTT, Judge, delivered the opinion of the court.

The important question in this case is whether the court had jurisdiction to enforce a mechanic's lien. The eleventh section of the act concerning mechanics' liens provides that any person having a lien under or by virtue of this act may bring suit to enforce the same in the circuit court of the county wherein the property on which the lien is attached is situated, without regard to its amount. In the case of *Gaty, McCune & Glasby v. Brown*, 11 Mo. 138, the terms of the statute conferring jurisdiction on the court of common pleas of St. Louis county were as broad as those employed in defining the jurisdiction of the Kansas court of common pleas, and it was held that the circuit court alone had jurisdiction to enforce the liens of mechanics, as the lien, the foundation of the action, was filed in the circuit court and there was no provision by which it could be transferred to another court. The liens under the act have priority in the order of filing them in the clerk's office of the circuit court. Where there are many liens on the same building, it would produce great confusion if different courts could enforce their judgments by executions against it. The court in which the liens were not required to be filed could know nothing of them. The sales would be made at places remote from the record of liens, and purchasers might be misled or the property sacrificed by reason of the uncertainty of their existence. The present lien law, unlike those that formerly prevailed, is silent as to the manner in which executions against property

subject to lien shall be issued. Under such circumstances, it would seem all-important that the sales should take place in a situation convenient to the records. The circumstance that a lien, the amount of which is within the jurisdiction of a justice of the peace, is authorized to be enforced in the circuit court, carries with it a strong intimation of an intention that all suits to enforce liens should be in the same court. Under the former laws, debts secured by a lien not exceeding the jurisdiction of a justice might be sued for in a justice's court, and after judgment, if necessary, the lien might have been enforced by *scire facias* in the circuit court. There is no such provision now. The act organizing the Kansas court of common pleas, in expressly conferring on that court jurisdiction in actions against boats and vessels, may have intended to exclude jurisdiction in other cases of lien. Upon the whole, as it is not clear that the law intended to confer jurisdiction on the court of common pleas, and as it is a matter of construction, we deem it best to give the statute an interpretation that will be productive of the least inconvenience.

The judgment in the case must necessarily be reversed for the error in permitting the plaintiff to dismiss his suit as to the defendant Ayres. This precise point was determined in the case of *Wibbing v. Powers*, 25 Mo. 599. Ayres was the real debtor. He made the contract for the materials furnished and was the only person who could defend the plaintiff's suit. It having been dismissed as to him, there was no one to contest the validity of the plaintiff's demand; so the result, in effect, is as though Bryant's property had been condemned to satisfy a lien, the existence of which was never established.

There is another point of view in which this question may be considered. The defendant Bryant is not even a resident of Jackson county, in which Kaw township is situated. The Kansas court of common pleas is one of local jurisdiction. Persons residing out of the limits of Kaw township can not be sued in that court unless joined with one who is a resident. Will, then, the law permit a plaintiff to join a resident

Hill v. Martin.

of the township as a defendant merely for the purpose of bringing in one who is not subject to the jurisdiction of the court, and, so soon as he is brought in, suffer the suit to be discontinued as to the resident defendant, thus voluntarily taking away all foundation for the jurisdiction of the court? In justices' courts, if the plaintiff fail to obtain judgment against that defendant who resides in the township in which the suit is commenced, he will be nonsuited as to the other defendants who are nonresidents. (R. C. 1855, p. 932, § 18.) The great facility for joining parties now tolerated by law makes this a matter of some importance.

Judgment reversed; Judge Richardson concurs. Judge Napton absent.

HILL *et al.*, Appellants, v. MARTIN *et al.*, Respondents.*

1. Should a testator, by reason of a failure to name or provide for some of his children in his will, be deemed in law to have died intestate as to those not named, they can not maintain against the devisees an action for the partition of the property embraced in the devise; resort must be had to a petition for contribution, in which the equities arising out of advancements may be adjusted.

Appeal from Lafayette Circuit Court.

Ryland & Son, for appellants.

I. The testator John Hill not having named his son William Hill in his will, there is nothing in the will by which the court can be justified in saying that William Hill was intentionally omitted, and that therefore John Hill did not die intestate as to William, and this case is not like that of *Guitar et al. v. Gordon et al.*, 17 Mo. 408; nor is it like the case of *Hockensmith & wife v. Slusher*, 26 Mo. 237; 9 Fost. 533; 18 Pick. 162; *Bradley v. Bradley*, 24 Mo. 311.

* This case was submitted at the July term, 1858, of the supreme court.—
[REP.]

Hill v. Martin.

Troxell, for respondents.

I. There was no such case of intestacy as is alleged by appellants; because the said grand-children of the testator were not, nor was either of them omitted to be named or provided for in said will through inadvertence or forgetfulness on the part of the testator. The naming of one of said grand-children by the testator in his will, more especially the giving to her a valuable legacy, excludes the idea that the other grand-children were not then in the mind of the testator. On the contrary, it is impossible that where, as in the case at bar, the grand-children are all known to the testator—several of them living in his immediate vicinity, and one of them under his own roof—it is impossible that the testator could have selected one of those grand-children as a beneficiary of his bounty, and not have the rest of them in his mind at the time. (17 Mo. 408; 24 Mo. 311; 25 Mo. 70; 1 Mass. 146; 2 Mass. 146; 2 Mass. 570; 5 Mass. 194; 14 Mass. 357; 2 N. H. 499; 26 Mo. 237.)

RICHARDSON, Judge, delivered the opinion of the court.

This is a proceeding for partition of land and slaves that belonged to John Hill at the time of his death. The plaintiffs are grand-children of John Hill and children of William Hill, a son of John Hill, who died before his father. John Hill by his will gave all his estate (after the death of his widow) to his daughters Mrs. Martin, Mrs. Scott and Mrs. Parks, and to his grand-daughter Luann Hill, the plaintiffs' sister; and the plaintiffs claim a portion of the estate on the ground that they are heirs of John Hill, and that he died intestate as to them because they are neither named nor provided for in his will. The petition makes all the devisees parties, and also strangers to the family, who are represented as claiming interests in the land acquired since the death of the testator; and one of them, Mr. Hays, sets up in his answer that he had become the absolute owner of the land devised to Mrs. Parks by virtue of regular proceedings

Hill v. Martin.

for partition in the Lafayette circuit court, instituted by her heirs after her death.

In my opinion, the plaintiffs did not adopt the proper mode to accomplish the object they sought. If any part of the land was adversely held by others, the plaintiffs could not assert their rights to it by an action for partition; (*Lambert v. Blumenthal*, 26 Mo. 471;) and under the circumstances disclosed in the record, their appropriate remedy was a proceeding to obtain contribution from the devisees.

The plaintiffs ground their right to recover on the thirtieth section of the statute of wills of 1835, which declares that if any person make his last will and die leaving a child or children, or descendants of any child or children (in case of their death), not named nor provided for in such will, every such testator, so far as shall regard any such child or children or their descendants, shall be deemed to die intestate, and such child or children, or their descendants, shall be entitled to such proportion of the estate of the testator as if he had died intestate, and the same shall be assigned to them; and all the other legatees, devisees and heirs shall refund their proportionate part, provided such children or their descendants so claiming have not had an equal proportion of the testator's estate bestowed on them in the testator's lifetime by way of advancement. The thirty-third section provides that when any devisees, legatees or heirs shall be required to refund any part of the estate received by them for the purpose of making up the share, devise or legacy of any other devisee, legatee or heir, the circuit court shall, upon petition of the party entitled to such contribution, order a contribution and distribution of such estate according to equity.

If a person dies intestate leaving children, they are entitled to the whole of his estate subject to the widow's dower. The aggregate of their shares is the whole, and the proportional part of each is according to their number; and therefore what their advancements may have been is only a question between themselves, and can not be inquired into by

Hill v. Martin.

others. And so, if a person makes a will and dies leaving children and does not name them nor provide for them, so far as they are concerned he will be deemed to die intestate, and they will take the same interest in his estate as if he had actually died intestate. In such a case the children would have no equities to adjust with third persons, and there would be no necessity of resorting to the provisions of the thirty-third section for the purpose of obtaining contribution, but, as the whole estate descends on them, they could maintain ejectment for the land, to which they are entitled in right of their ancestor, to the same effect as if there had been no will.

If, however, all of the children are not omitted, but some of them are named or provided for and others not, the devisees, whether all of them are children or not, can defeat the claims of those not provided for, by showing that they had received in the testator's lifetime their equal proportion of the estate by way of advancements. The legacies and devisees can not be treated as nullities, but the legatees or devisees would only be bound to refund their proportional parts. And in order that the equities of all parties might be properly adjusted, it would be necessary to resort to the mode pointed out in the thirty-third section. A child not provided for can not defeat all the devises by claiming and recovering a share of each, but would only be entitled to contribution for a sum sufficient to make him equal to that which he would have been entitled to if there had been no will.

This case illustrates the reason why pretermitted heirs should resort, in some instances, to the more flexible proceeding of a bill for contribution, rather than to an action of ejectment or partition. If it should be decided that the plaintiffs' grand-father died intestate as to them within the meaning of the statute, the legatees may show that their father was advanced in his lifetime in whole or in part, or they may be fully compensated by the legatees without interfering with the rights of third persons who may now own the property. There would be no propriety in assigning to them

Winston v. Taylor.

portions of each piece of property when contribution could otherwise be made "according to equity."

I do not find that it has ever been decided by this court in what manner a child not provided for in a will may assert his rights conferred by the thirtieth section. In *Block v. Block*, 3 Mo. 407, and *Hockensmith v. Slusher*, 26 Mo. 237, the right was claimed in partition proceedings. *Beck v. Metz*, 25 Mo. 71, was an agreed case. In *Bradley v. Bradley*, 24 Mo. 311, the children filed a petition against the widow and sole devisee for the assignment of her dower; and in *Levin v. Stephens*, 7 Mo. 90, and *Guitar v. Gordon*, 17 Mo. 408, the plaintiffs pursued the mode indicated in the thirtieth section.

The view I have taken of the case renders an expression of opinion unnecessary on the point on which the case seems to have turned at the trial. I am in favor of affirming the judgment without prejudice to the right of the plaintiffs to bring another suit in a different form. *Napton*, Judge, did not sit, having been of counsel.

SCOTT, Judge. I concur in affirming the judgment.

WINSTON *et al.*, Plaintiffs in Error, v. TAYLOR, Defendant
in Error.

1. A defendant can not be permitted to introduce evidence to support a defence to the action not set up in his answer.
2. Where property is bailed to a partnership, one partner can not absolve himself from liability to a bailor, without the latter's consent, by retiring from the firm. Where, however, property is not bailed for any definite time, but the bailor may take the same away at any time, a retiring partner may give notice to the bailor of his retiring and may require him to take away the bailed property; if the bailor should then permit it to remain after the expiration of a reasonable time, he must look to the remaining partners; the retiring partner would be absolved from liability for loss occurring after his retirement.
3. A judgment obtained in a sister state upon notice to the defendant by publication only, there being no appearance of the defendant, will be deemed null and void outside the state in which it is rendered.

Error to Miller Circuit Court.

Claybrook's testimony, referred to in the opinion of the court, was to the following effect, that he had heard Taylor say in California to some of the plaintiffs that he had sold his interest in the ranche, and intended coming home to Missouri and told them to go down and see about their stock; that "they talked like they would go down." The fifth and sixth instructions alluded to are as follows: "5. If Taylor sold his interest in the ranche and notified defendants or either of them to go and get their stock, the defendant can not be affected by the declarations of Amick or any other of the partners after such sale, notice and request, as to any thing which happened after such sale. 6. If the defendant sold out his interest in the ranche and notified plaintiffs or either of them of such sale, and requested them to go and take charge of their stock, he is not liable for any loss of the same, if such loss happened after such sale, notice and request."

Edwards & Ewing, for plaintiffs in error.

I. The circuit court gave contradictory instructions to the jury. The seventh instruction asked and given for the plaintiffs is in conflict with the fifth and sixth instructions given for the defendant and calculated to mislead the jury.

II. The court erred in instructing the jury as to the burden of proof in the case as declared in defendant's first instruction. The defendant having received the property of plaintiffs, he was bound to account for it when called upon by plaintiffs, and the burden of proof was on him to excuse himself for such failure.

III. The court erred in permitting the evidence of George W. Claybrook to go to the jury. No such defence is set up in defendant's answer as is made by that evidence, and the evidence was therefore incompetent.

IV. The court erred in sustaining the defendant's demurrer to plaintiffs' original petition. The plaintiffs declared on

a judgment between the parties rendered by a court of competent jurisdiction in the state of California. The service was by publication under the statute of that state. (Story's Conflict of Laws, § 608.)

Parsons, for defendant in error.

I. The circuit court erred in striking out that part of defendant's answer setting up the statute of limitations in bar of the recovery sought. The foreign judgment was the foundation of the action; it not appearing that such judgment is regular or authorized by the laws of California, the demurrer was well sustained to the original petition. The amended petition set up another cause of action, and it was competent for the defendant to plead the statute to such action if it had not occurred within five years, which was a question of fact for the jury.

II. The circuit court should have sustained the defendant's motion to strike out all of defendant's amended petition. It was a new cause of action different from that set out in the original petition. There was no error in admitting the evidence of G. W. Claybrook, which was competent to show care and diligence on the part of the defendant, which was the gist of the matter in controversy, and any evidence tending to show care and prudence in regard to the property of plaintiffs while in charge of defendant was competent in his defence. (1 *Parsons on Contracts*, p. 621.)

IV. The burden of proof in this case as to negligence or want of care was upon the plaintiffs, and the defendant was not bound to prove affirmatively that he used reasonable care. (See *Parsons on Contracts*, 606, 621.) The defendant's first instruction was therefore proper.

V. There is no conflict between the plaintiffs' seventh instruction and the fifth and sixth instructions asked for by defendant; the promise to ranche the stock was for an indefinite time, defendant therefore had the right to require plaintiffs to receive the stock, and they having failed to do so defendant was discharged from further liability. If there

Winston v. Taylor.

was a conflict in the instructions, it resulted to the injury of defendant, for no instruction maintaining the opposite of the above should have been given.

VI. There being evidence to sustain the verdict, this court will not undertake to weigh it, but will let the verdict of the jury remain undisturbed.

RICHARDSON, Judge, delivered the opinion of the court.

The defendant and his partners, who kept a "ranche" in California, received of the plaintiffs, in September, 1850, eight horses and seven mules to be herded on their ranche, for which the plaintiffs were to pay three dollars per head each month. By this contract the defendant did not insure the safety of the stock, but was only bound to take ordinary and reasonable care of it, and was only responsible for ordinary negligence. (Story, Bail. § 443.)

The amended petition on which the action was tried, after setting out the contract and its legal effect, averred that though the plaintiffs demanded the horses and mules of the defendant, only six of the horses and four of the mules were delivered, and that the others were lost by reason of the negligence and improper care of defendant. The defendant admitted that some of the horses and mules were lost, but denied that they had been demanded by the plaintiffs, or that they were lost by the carelessness or negligence of the defendant. The only issue tendered by the answer was whether the property was lost by the defendant's negligence. No new matter was introduced or relied on, and there was nothing to warrant the admission of Claybrook's testimony, or the giving of the fifth and sixth instructions asked by the defendant. The defence made for the first time at the trial amounted to a release, which was inadmissible, if for no other reason than because it was not set up in the answer.

The defendant could not absolve himself, without the consent of the plaintiffs, from the liability the contract imposed on him and his partners, by retiring from the firm. (Holden v. McFaul, 21 Mo. 215.) But as the stock was not placed

Winston v. Taylor.

in the defendant's custody for any definite time, and the plaintiffs could have removed it at their pleasure, the defendant on, the other hand, could have required the plaintiffs to take it away, by giving them reasonable notice; and, in my opinion, if Taylor had advised them that he intended to give up the business and leave the country, and had requested them to remove their stock, there would be no hardship in holding, if they permitted it to remain after the expiration of a reasonable time within which they could have taken it away, that they looked to the other partners to take care of their property, and discharged him from the contract. Such a defence, however, ought to be clearly made out, not only as to the request, but that reasonable time was given after notice for the removal of the stock, and that a cause of action against him had not already accrued.

There is, perhaps, no absolute rule for determining in every case upon whom the burden of proof rests, whether upon the bailor, to establish the negligence by which the property was lost, or upon the bailee, to show that the loss has been without any neglect on his part. Sometimes it depends on the form of the action and upon the stage of the cause at which the question arises. In an action of trover, the plaintiffs may rely on a demand and refusal of the property, and thus put the opposite party on the defence; but in an action of assumpsit, or an action on the case founded on negligence, the plaintiff must make out a *prima facie* case as he charges it; for it is a general common law principle that every person is presumed to do his duty until the contrary is shown. (Story Bail. § 213, 278, 410, 454.) It is also said that when the thing bailed is lost or injured, the bailee is bound to account for such loss or injury; but when this is done, the proof of negligence or want of due care is thrown on the bailor. (1 Parsons on Cont. 606.) In this case, however, the question did not arise, and there was no propriety in giving the instructions asked by either party on the subject, for the pleadings admitted the bailment and the loss of the property, and both parties gave evidence bearing on the subject of

Miles v. Jones.

negligence, and, as the whole case was before the jury, the only question to be decided was whether the loss resulted from the want of ordinary care and attention.

The demurrer was properly sustained to the original petition, for, as the defendant never appeared to the suit in California, the notice by publication was insufficient to authorize an action in this state on the record of the judgment. (Stonestreet v. Shannon, 1 Mo. 375; Sallee v. Hay, 3 Mo. 84; Smith v. Ross, 7 Mo. 463.)

Judge Scott concurring, the judgment will be reversed and the cause remanded. Judge Napton absent.

MILES, Plaintiff in Error, v. JONES, Defendant in Error.

1. A judgment procured by fraud should be set aside at the instance of the party against whom it was rendered.
2. It is not necessary in pleading to allege that a guaranty relied on is in writing.

Error to Ray Circuit Court.

Demurrer to a petition. The petition alleges substantially that in the year 1855 the defendant Jones became indebted to plaintiff in the sum of \$41.47 for money paid by plaintiff to Messrs. Gratz & Shelby for said Jones on a guaranty; that suit was instituted against said Jones before a justice of the peace to recover the amount so paid; that said cause was at various times continued at the instance of said Jones and was transferred to another justice; that on the 12th of July, 1856, the law day of the justice before whom the cause was pending, the justice being unwell, in consequence of such illness announced to the suitors and witnesses then present his determination not to hear or try any of the causes then pending before him, but to continue the same until the next succeeding law day, and thereupon gave parties, witnesses and the attending constable to understand that they need no longer remain; that defendant Jones was present

Miles v. Jones.

when this announcement was made ; that plaintiff, when on his way to the office of said justice, met several persons who had gone to the office of said justice as witnesses in causes pending before him and were leaving in consequence of the justice's announcement of his determination not to try any of said causes ; that believing his said cause had been continued he did not go in person before said justice ; that defendant Jones, after plaintiff and the other parties and witnesses had dispersed and late in the afternoon of said 12th of July, 1856, returned to the office of said justice, and, with intention to cheat and defraud plaintiff, prevailed upon the justice to hear said cause at that time and in plaintiff's absence, and thereupon filed for the first time an account by way of set-off amounting to \$131.47 ; that the justice yielded to the importunities of said Jones and took up said cause for hearing, and without any testimony in support of defendant's account allowed the same, and, after deducting plaintiff's demand, rendered judgment against plaintiff for the balance of defendant's account—ninety dollars and costs ; that the justice afterwards issued execution and delivered the same to the constable ; that the plaintiff acquired no knowledge of the existence of said judgment or of the issuing of said execution until about the last of August, 1856, too late to take effective measures to stay the collection thereof ; that defendant still owes plaintiff said sum of forty-one dollars and forty-seven cents so paid by plaintiff on the guaranty ; that the account filed by defendant was a trumped up demand without foundation in fact ; that defendant has since the rendition of said judgment and the collection thereof made his boasts that he had overreached plaintiff ; that, so far from his (defendant) having had any demand against plaintiff, plaintiff did not owe him any thing ; that defendant procured said judgment by fraud. The plaintiff prays the court to set aside and annul said judgment, and give judgment in favor of plaintiff for said sums of \$41.47 and \$103, with interest, &c.

The court sustained a demurrer to this petition.

Miles v. Jones.

Troxell, for plaintiff in error.

I. The judgment was obtained by fraud and was void, or at least voidable. The plaintiff not being present, the justice had authority only to continue or dismiss the cause. Plaintiff had sufficient reason for not appearing on the day the judgment was rendered. There was no need of averring that the guaranty was in writing. The demurrer was improperly sustained.

RICHARDSON, Judge, delivered the opinion of the court.

It is sufficiently averred that the judgment before the justice was procured by fraud, which vitiated it, and that the defendant, after he had pocketed the ill-gotten fruits of his fraud, gloried in his shame. The payment of the judgment under the circumstances stated in the petition was not voluntary, and a satisfactory reason is given why an appeal was not asked or taken in time.

The statute of frauds has not changed the common law mode of declaring, and it was not necessary to have stated that the guaranty was in writing. (2 Saund. Pl. & Ev. 126.) The right however of the plaintiff to recover back the money received by the defendant on the execution did not depend on the question whether he could have recovered on his original demand before the justice; for, admitting that the plaintiff could not have maintained his action, that fact gave the defendant no right to a fraudulent judgment on his set-off.

If the averments in the petition are sustained by the proof on the trial, and it is shown that the plaintiff properly made the payment on the guaranty of a debt due by the defendant, he will be entitled to recover the sum so paid; and the defendant should also be compelled to restore the amount received on his execution.

The demurrer was improperly sustained and the judgment will be reversed and the cause remanded; Judge Scott concurring. Judge Napton absent.

State v. Gardner.

THE STATE, Defendant in Error, v. GARDNER, Plaintiff in Error.

1. An indictment, founded on section 8 of the eighth article of the act concerning crimes and punishments (R. C. 1855, p. 624), charging the defendant with an open and notorious act of public indecency, grossly scandalous by "exhibiting and exposing his private parts in presence of a male and female, at," &c., is sufficient.

Error to Polk Circuit Court.

The following is the indictment in this case: "The grand jurors, &c., present that John Gardner, of, &c., on, &c., at, &c., was then and there guilty of an open and notorious act of public indecency, grossly scandalous, by then and there exhibiting and exposing his private parts in presence of a male and female, at the county of Polk aforesaid, against," &c.

Wright, for plaintiff in error.

I. The indictment is not good either upon the statute or at common law. (2 Bailey, 149; 8 Mo. 494; 1 Chitt. C. L. 168.) It should have been stated that the acts constituting the offence were openly and notoriously committed; that the act was committed publicly, or in a public place, or in public view. (2 Cox, C. C. 376; 13 Jurist, 42; 5 Barb. 203.) The names of the persons in whose view the alleged exposure took place should have been stated. The presence of "a male and female" does not necessarily imply that the act was done in the presence of persons.

Ewing, (attorney general,) for the State.

This indictment is good; it is in the words of the statute. (R. C. 1855, p. 625, § 8.)

RICHARDSON, Judge, delivered the opinion of the court.

The indictment not only charged the defendant generally in the words of the statute with being "guilty of an open and notorious act of public indecency, grossly scandalous,"

Lusk v. Lusk.

but specified with sufficient certainty the act that constituted the offence.

The indictment was sufficient, and the judgment will be affirmed; Judge Scott concurring. Judge Napton absent.

LUSK, Appellant, v. LUSK, Respondent.

1. It does not follow as a matter of course that the party prevailing in a suit for a divorce shall have the care and custody of the children; the court may, in its discretion, if the good of the children require it, grant the care and custody of them to the other parent.

Appeal from Laclede Circuit Court.

This was a suit for divorce by Amanda J. Lusk against Alfred T. Lusk. It appeared in evidence that the parties were married in the year 1847; that in the year 1850 the defendant left for California intending to return in a year and a half or two years; that he left behind his wife and two children; that he remained away until the year 1857; that in the year 1855, his wife, supposing him to be dead, having received a letter in the year 1854 from California stating the fact of his death, married one George M. Winton; that upon the return of the defendant, the plaintiff and said Winton ceased cohabiting. The defendant filed a cross-bill for a divorce, alleging adultery of his wife with said Winton. The court granted a divorce to the defendant, and gave him the care and custody of the children.

Wright, for appellant.

I. The court erred in refusing the instructions asked by the plaintiff and also in declaring the law in favor of the defendant. The finding should have been in favor of plaintiff. The view which the court below took respecting the wilful absence of the defendant was erroneous. Defendant by his wilful absence, without reasonable cause, for the space of two

Lusk v. Lusk.

years, forfeited his marital rights, and plaintiff became entitled to a divorce. It is not pretended that she had forfeited that right either by condonation or connivance, and it is submitted whether her marriage with Winton, under the honest conviction that her husband was dead, would authorize the court to withhold from her the right to a divorce already acquired. If there was any previous doubt existing on this point, the second section of the act of November 23, 1857, (Sess. Acts, 1857, Adj. Sess. p. 173,) disperses such doubt, by declaring that such subsequent marriage shall not be considered as a reason why she shall not be divorced. It can not be said that the second section of the act is unconstitutional, for it applies alone to the remedy and takes away no existing right. This is a remedial statute which may be of a retrospective nature when they only go to confirm rights already existing, and a furtherance of the remedy by curing defects or adding to the means of enforcing existing rights. (1 Kent's Comm. 502; Goshen v. Stonington, 4 Conn. 209.)

II. The care and custody of the children should have been given to plaintiff.

Freeman, for respondent.

I. The court did right in divorcing defendant from plaintiff. The plaintiff had, in contemplation of law, committed the crime of adultery, and the supposed marriage with George Winton can not relieve her; neither can the act of November 23, 1837, release her. That act is unconstitutional and void. (State v. Sloss, 291.) The court properly granted the care and custody of the children to the father. The father while living is the proper one, as a general thing, to have the care of the children even if the wife was not otherwise encumbered with another marriage.

RICHARDSON, Judge, delivered the opinion of the court.

The judgment of divorce rendered on the defendant's cross-bill expressly removed the restriction on the right of the plaintiff to marry again, and as she has really secured

Lusk v. Lusk.

all that she asked, it is no longer a practical question whether she was entitled to a judgment in her favor, and it is therefore unnecessary for us to consider it. We think, however, that the judgment should be modified so as to give her the care and custody of the children.

As a general proposition, the father is the guardian of his children, and entitled against all the world to their custody during their minority. But this is not an absolute right under all circumstances, and it is controlled in the sound discretion of the courts in reference to the best interests of the children. Our statute regulating the subject of divorce provides that the court shall make such order touching the care, custody and maintenance of the children, or any of them, as from the circumstances of the parties and the nature of the case shall be reasonable. If the party against whom the decree is rendered is unfit to be trusted with the care and education of the children, they ought to be assigned to the custody of the other parent; but it does not follow as a matter of course, that the party prevailing in the suit shall have the care of the children. No absolute rule is laid down for determining which of the parties shall keep the children, but "the leading principle is to consult the good of the children rather than the gratification of the parents." (Bishop, Mar. & Divorce, § 636.)

It appears in this case that when the defendant went to California, where he remained more than seven years, the oldest child was about two years of age, and the other an infant, and that during all that time he rarely wrote a letter to his family, and never contributed any thing to their support. So long an absence would naturally to some extent alienate the children from him, and he would not perhaps feel so tender to them as if he had remained at home. It is shown, on the contrary, that during the defendant's absence the children were under the exclusive care of the plaintiff; that she provided for all their wants; watched faithfully over their education; was a kind and affectionate mother, and that they were in all respects well taken care of.

Crook v. Davis.

They would naturally cling to her, as she would to them, and it would be unkind to them to take them from her. There is not a breath of suspicion against her character, and nothing is disclosed by the evidence to justify the inference that she is not a proper person to protect their health, to provide for their comfort, to guard their morals and direct their education. Their happiness requires that they should be reared up together, and it would be cruel to separate them; and, considering their tender age, no one so well as their mother can give them that kind attention and assistance which they will daily need. The defendant of course can visit them and they may visit him, and as the separation is believed to be necessary for their good and not on account of any distrust of his parental regard for them, he will no doubt find it to be his pleasure, as it is his duty, to cultivate their affection for him and to contribute to their maintenance as he may be able and their necessities may require.

The judgment will be reversed and modified in conformity to this opinion; Judge Scott concurring. Judge Napton absent.

CROOK, Respondent, v. DAVIS, Appellant.

1. A person can not give himself credit as the partner of another by holding himself out to the world as such without the consent, express or implied, of such other person.

Appeal from Andrew Circuit Court.

This was an action in the nature of an action of *trespass de bonis asportatis*. The plaintiff alleges that the defendant wrongfully entered the close of plaintiff and took and carried away a large quantity of bricks belonging to plaintiff. The defendant admits the taking of the bricks, but set up that they were sold to him by one McCain, a partner of the plaintiff in their manufacture. Declarations and acts of McCain

Pilkington v. Trigg.

were adduced to prove the existence of the alleged partnership. It is deemed unnecessary to set forth the evidence and instructions bearing upon this question.

Ryland & Son, for appellant.

I. Though plaintiff and McCain were not partners as between themselves, they were partners as to third persons.

Hall and Loan, for respondent.

SCOTT, Judge, delivered the opinion of the court.

We are of opinion that this case was fairly put to the jury by the instructions given by the court. The matter of partnership was made to play a more prominent part in the cause than it deserved. McCain could not by his acts, conduct or declarations make himself a partner of the plaintiff without his knowledge and acquiescence. He could not give himself credit as a partner, by holding himself out as such, without the consent, express or implied, of the plaintiff. It is useless to review the instructions separately, as they clearly put the fact of partnership to the jury, which was the only one on which the defendant relied, and which was negatived by them and very properly, if we may judge by the record, as there was little or no evidence in support of it. If the case is as presented by the record, no benefit whatever could result from the granting of a new trial. Affirmed; Judge Richardson concurs. Judge Napton absent.



PILKINGTON, Appellant, v. TRIGG & PHILLIPS, Respondents.

1. To maintain an action for the possession of specific personal property, the plaintiff must be the owner, or be entitled to the possession, of the specific property claimed.
2. A. purchased certain property of B. and gave to the latter in payment therefor drafts on St. Louis; these drafts B. delivered to C., a banker, for collection; C. received payment of the same and placed the amount collected to the credit of B. *Held*, that A. could not, in an action for the recovery of specific personal property, recover the amount so collected by C.

Pilkington v. Trigg.

on the ground that he had been induced to make said purchase by fraudulent representations on the part of B.; nor could such an action be maintained, although C. should, after its commencement, separate from the general mass of moneys in his possession the amount so collected for B. and should place the same in a bag marked "A. or B."

Error to Cooper Court of Common Pleas.

*Stephens & Vest and Jewett, for*appellant.*

I. The drafts having been obtained by fraud their transfer by Pilkington passed no title to Phillips, and Pilkington could recover their proceeds so long as they could be identified. no matter how many changes they might undergo. (1 Mo, 46; 26 Mo. 494; Story's Eq. § 437, 439, 513, 1256; 5 Dana, 196.) The plaintiff instituted the proper form of action. Our statute providing for the claim and delivery of personal property is intended as a substitute for the common law remedies of detainer, replevin and trover; and when these actions could be maintained the statutory action like the present can also be had. (See 5 How. Pract. Rep. 327; Voorhies, N. Y. Code, 152 and note; 1 Chit. Pl. 166; 17 Mass. 606; 23 Maine, 196; R. C. 1855, 1242.) It can not affect plaintiff's right of action to grant that the money (\$950) was placed in a bag and marked as stated in the amended petition since the service of the writ. Plaintiff had a right under the new practice to file an amended or supplemental petition setting up new facts or praying for a new or different relief from that asked in his first petition. (R. C. 1855, p. 1253; 8 How. Pract. Rep. 48; 9 id. 140; 3 How. Pract. Rep. 378.) In this case, after the amended petition was filed, the defendants answered denying its allegations, and went to trial upon this issue. They made no motion to strike out the allegation of facts since the commencement of the suit, but go to trial upon them. The evidence as spread upon the record establishes beyond all doubt a case of gross fraud on the part of Phillips in the sale of the book to Pilkington. The sale being void on account of fraud, if the notes or drafts given for the book had existed at the commencement of this

Pilkington v. Trigg.

suit in the hands of Trigg, the plaintiff would have been entitled to them on disaffirming the sale. Plaintiff being entitled to the notes or drafts, may pursue them through every mutation, or claim the property for which they were exchanged, or the proceeds when the property is irreclaimable, so long as the property or the proceeds remain in the hands of parties not *bona fide* purchasers, who have paid over the consideration. (DeVoise v. Sandford, 1 Hoffm. Ch. 192; 2 Story Com. on Eq. § 1232.) The moment Trigg was notified by plaintiff that the sale was rescinded on account of fraud, he, as also Phillips, became mere trustees or stakeholders for the benefit of plaintiff. (2 Story Eq. § 1265.) The evidence showing that at the commencement of the suit Trigg had the proceeds of the notes in his hands, having set apart a certain sum and marked it as the proceeds of said note, it is conclusive on the defendants that the sum so marked is the identical money received for the note.

Adams, for respondents.

I. This record presents the strange anomaly of a suit for a specific chattel, in the shape of a bag of gold conceived and brought forth into existence long after the commencement of the suit. This progeny, created after leave was given to file an amended petition, was a mere abstraction, and was not and could not form the subject of this litigation. How could a debt due from Trigg to Phillips be converted into a specific chattel in the shape of a bag of gold, without the knowledge or consent of the creditor, and be substituted as the cause of action? The bag of gold is still the property of Trigg and the debt from Trigg to Phillips still remains unpaid. No evidence was offered or given that had the slightest tendency to prove the case laid in the petition. The evidence looked alone to a transaction between the plaintiff and defendant Phillips about the sale of a document. Trigg was in nowise connected with this matter. Even if a debt could be converted into a specific chattel, the plaintiff would have no right to do so after the commencement of his suit and

Pilkington v. Trigg.

make it the foundation of the action. (See *Norcum v. D'Ench*, 17 Mo. 114.)

SCOTT, Judge, delivered the opinion of the court.

This case is not affected by the principle that money or property obtained under color of a fraudulent contract may be reclaimed upon the rescision of the contract by the injured party. We must have an eye to the form of the action in considering the plaintiff's right to a recovery. The petition alleges that the plaintiff is the owner of and is entitled to the possession of the following specific personal property, viz.: Nine hundred and fifty dollars in specie of the value of \$950, which said property is in a bag marked "B. Pilkington or W. T. Phillips." It is alleged for the plaintiff Pilkington that he was induced by the fraudulent misrepresentations of the defendant Phillips to purchase a book, which was supposed to contain valuable information in relation to the officers of the Virginia line who were entitled to bounty lands from Congress, but which was in reality altogether useless. The plaintiff paid Phillips for the book by drafts on bankers in St. Louis, which were delivered to the defendant Trigg by Phillips for collection, which being collected were placed to the credit of Phillips on the books of Trigg. Pilkington, conceiving that he was defrauded, gave notice to Trigg not to pay over the money. At this stage of the transaction, the plaintiff sued the defendants, alleging that he was entitled to the following specific property, viz., one thousand dollars in gold, of the value of one thousand dollars, which the defendants wrongfully detain from him. The petition having been held bad on demurrer, it was amended as it is first above stated: the plaintiff's counsel, after the demurrer and before the amendment, having induced Trigg to put nine hundred and fifty dollars in a bag and mark it as is stated in the amended petition.

It would be remarkable if the rights of parties could be made to depend upon contrivances of this kind. This is

Hodges v. Torrey.

evidently an attempt to sue a debtor of the creditor's debtor in an ordinary action at law. It is clear from the testimony that neither the plaintiff nor the defendant Phillips had any right to the specific money for which this suit was instituted. Trigg could not make it the money of Phillips by putting it into a bag without his consent; and if he could even do so, on no principle could it be done after the suit was brought, thereby creating a cause of action after the institution of the suit. The doctrine of courts of equity which sanctions the pursuit of a security or its proceeds in the hands of every one affected with notice of the fraud or trust, has nothing to do with this case. The plaintiff has sued to recover specific personal property, and it is clearly shown that he has no title to it. How then can he expect to recover? The suit was not brought in a manner which admitted the application of any equitable doctrines, even if the case had been one to which such doctrines had been applicable. The action was in such a form that an inquiry into the validity of the sale on the ground of fraud was altogether irrelevant, for even admitting the sale was void for fraud, that would give no title to the specific property sued for. Affirmed; Judge Richardson concurs. Judge Napton absent.

HODGES, Respondent, v. TORREY, Appellant.

1. In order that fraudulent representations made by a vendor to a vendee with respect to the character of the improvements upon the land sold may be the basis of relief to the purchaser in an action by the vendor on a promissory note given for a portion of the purchase money, it must appear that the misrepresentations were made with respect to something material and constituting an inducement to the contract.

Appeal from Putnam Circuit Court.

Davis, for appellant.

- I. The only question here is as to the answer. If the answer sets up facts which, if true, entitle the party in law to a

Hodges v. Torrey.

deduction in damages from the amount due by the note, then the court mistook the law in striking out the answer. The point is considered as settled in the cases of *House v. Marshall*, 18 Mo. 371, and that of *Grand Lodge of Masons v. Knox*, 20 Mo. 433.

Holly & Burckhardt and *Tindall*, for respondents.

I. The answer does not state that the appellant is damaged any amount. It does not state that the representations were falsely and fraudulently made, but states that they were false and fraudulent from the fact that the pre-emption right and improvements were not in existence. If the parties both had equal means of knowledge, and the appellant had an opportunity of examining the land for himself and neglected to do so, it is his own fault and he is without redress. (See *Sandford v. Justice*, 9 Mo. 855.) The mere fact that respondent represented that improvements were on the land which were not on the land does not constitute a defence unless it is alleged that he did so knowing that he was making false representations. The answer does not allege that the respondent had no claim upon said land at the time of filing the answer, or that there has been any failure on his part to convey the land to him. The answer does not state the facts fully. (See *Copeland v. Loan*, 10 Mo. 266.)

SCOTT, Judge, delivered the opinion of the court.

This was a petition to foreclose a mortgage given to secure the payment of a promissory note. It seems the defence set up was a partial failure of consideration, caused, it is alleged, by the false and fraudulent misrepresentations of the plaintiff. There were three answers filed to the petition. The first answer stated that the only consideration of the note was an undertaking on the part of the plaintiff to convey to the defendant, by a good and sufficient deed, the north half of the north-east quarter of section 18, in township 66, range 20; that plaintiff failed to execute the conveyance, and that defendant had never received possession of said land. This

Hodges v. Torrey.

answer also contained a set-off to the plaintiff's demand, amounting to \$234, alleged to be for so much money had and received of defendant to and for the plaintiff's use. This answer was on motion stricken out. An amended answer was then filed in which it was stated that the note sued on was given as a part of the consideration of the purchase of the south-west quarter of the south-west quarter of section five, and the east half of the north-east quarter of section seven, and the west half of the north-west quarter of section eight, and south-east quarter of the north-east quarter of section eighteen, and also the north half of the north-east quarter of section eighteen, all in township 66, range 20; that the price agreed to be paid for these lands was the sum of \$2,630; that all of said sum had been paid except the note secured by the mortgage, the subject of this suit, which was given wholly in consideration of the balance of the purchase money aforesaid; that the plaintiff, at the time of the sale of the said lands, represented that he had and owned a legal pre-emption right and claim to the last mentioned tract, to-wit: the north half of the north-east quarter of section eighteen, which was estimated at the price of \$234, which formed a part of the said sum of \$2,630; that the representations of plaintiff were false and fraudulent in this, that the plaintiff did not hold or have any claim of pre-emption or any right to said land, but the same was public land. This answer was, on motion, stricken out. A second amended answer was filed. The amended answers were filed at a term subsequent to that at which the first answer was filed. The last answer stated that the note sued on was given in consideration of the balance of the purchase upon a contract of sale for the following described lands, viz., the south-west quarter of the south-west quarter of section five; the east half of the north-east quarter of section seven, and the west half of section seven, and the north half of the north-east quarter of section eighteen, township 66, range 10; that at the time of the sale of the lands the plaintiff represented that he had possession of and owned a pre-emption claim



Hodges v. Torrey.

and had improvements of the value of \$234 on the last mentioned tract of land, viz., the north half of the north-east quarter of section eighteen; that the purchase was made, relying upon said representation, without any examination of said land by the defendant; that the said representation was false and fraudulent in this, that the plaintiff did not have a claim or the possession of said land at said time, but that the same was public land; that said representation was moreover false and fraudulent in this, that the plaintiff did not have on the said land improvements of the value of \$234 or of any other value; that in truth and in fact there were no improvements on the same. Wherefore defendant said that by reason of such false and fraudulent representations he had been damaged, and he claimed and asked to recoup the sum of \$254 from said note. This answer was stricken out, and the defendant failing to answer further, judgment was entered for the plaintiff.

This case is unlike that of *House v. Marshall*, 18 Mo. 368, in which relief was given on account of misrepresentations as to the quality of the land made by the vendor to the purchaser. There land lying in Missouri was sold to one in Kentucky, who had never lived in Missouri, and who had never seen it. So, in the case of *Smith v. Richards*, 13 Pet. 26, which is a leading one on this subject, a sale was made of land lying in Virginia to a citizen of New York, who had never seen it. Here, it does not appear that the defendant was ignorant of the state of the land. His petition shows that he seeks relief on the ground that the improvements did not exist, which were represented to be on the land. The defendant says that he did not examine the land. As that subject was on his mind, why did he not make a clean breast of it, and state whether or not an examination of the land was necessary in order to be apprised of its state? For aught that appears, he might have lived within sight of it. Sugden says the rule of the civil law was *simplex commendatio non obligat*. If the settler merely made use of those expressions which are usual to settlers who praise at random

Hodges v. Torrey.

the goods which they are desirous to sell, the buyer, who ought not to have relied upon such expressions, could not upon this pretext procure the sale to be dissolved. The same rule, he continues, prevails in our law and has received a very lax construction in favor of vendors. It has been decided that no relief lies against a vendor for having falsely affirmed that a person bid a particular sum for the estate, although the vendee was thereby induced to purchase it and was deceived in the value. Neither can a purchaser obtain any relief against a vendor for false affirmation of value; it being deemed the purchaser's own folly to credit a nude assertion of that nature. Besides, value consists in judgment and estimation, in which many men differ. (1 Sug. V. & P. 2.) Considering that this was the third attempt to make a defence, and that this attempt was inconsistent with the others, which were inconsistent with each other, the conduct of the defendant has more the appearance of trifling with the court than that of making an answer to the action. The defences were naturally weakened by their inconsistencies, and, under the circumstances, the court acted correctly in requiring of the defendant a legal defence clearly and intelligibly stated. The answer fails to show any such imposition on the defendant as would authorize the granting him any relief. After three efforts he should have made a plain case, one that showed that he was deceived and imposed upon, and not one which is never heard of until he is called upon for the payment of the purchase money. There is no allegation that the misrepresentation was of something material, constituting an inducement or motive to the contract. It is stated that reliance was placed on the representations of the plaintiff, but it is nowhere averred that the improvements were the inducement to the purchase. What are improvements is a matter about which men may differ. What is an improvement in the judgment of one man may be a deterioration in the opinion of another. Why was not the character of the improvements stated?

Judgment affirmed; Richardson, Judge, concurring.

Keyte v. Plemmons.

KEYTE *et al.*, Plaintiffs in Error, v. PLEMMONS *et al.*, Defendants in Error.

1. Each court may control the execution of its own process. Should a court, in a suit for partition, order a sale of land situate in a county other than that in which the suit is pending, it may entertain a motion to set such sale aside on the ground of fraud on the part of the purchaser.
2. Should, however, an original action be instituted to set aside such sale, it must be brought in the county in which the land is situated.

Error to Carroll Circuit Court.

Davis, for plaintiffs in error.

I. Inasmuch as the lands are situate in Carroll county and this is an original suit affecting the title to the lands on account of fraud in the sale, no other court has original jurisdiction of the subject of this suit. (R. C. 1855, p. —, art. 4, § 3.)

Harris, for defendants in error.

I. The circuit court of Carroll county had no jurisdiction of the action because the sale which is attacked by the petition was made under and by virtue of a process or order emanating from the circuit court of Clinton county. The latter court had the sole control of all proceedings under its order. (See *McDonald v. Tiernan*, 17 Mo. 604; *Pettus v. Elgin*, 11 Mo. 411.)

SCOTT, Judge, delivered the opinion of the court.

By virtue of a judgment in partition rendered by the Chariton circuit court in May, 1855, land belonging to the estate of Jas. Keyte, deceased, lying in Carroll county, was sold by the sheriff of that county. At the sale the ancestor of the defendants became the purchaser at a greatly reduced price in consequence as it is alleged of the fraudulent misrepresentations made by him. This suit was brought in the Carroll circuit court by the heirs of Keyte against the heirs

Keyte v. Plemmons.

of the purchaser to set aside the sale for the alleged fraud. The court below sustained a demurrer to the petition on the ground that the Carroll circuit court had no jurisdiction of the cause.

The parties interested in the sale had the option of two remedies for the misconduct of the purchaser—a motion in the court where the judgment was rendered to set aside the sale at the coming in of the report, or an original action to vacate the proceedings for fraud. Had the former remedy been adopted then the principle of the cases of *Pettus v. Elgin*, 11 Mo. 411, and *McDonald v. Tiernan*, 17 Mo. 603, would have been applicable, and the motion would have been properly made in the Chariton circuit court, as that court alone had the control of the execution of its process. But as the plaintiffs did not see proper to pursue this remedy, but adopted that of an original petition, they had no other guide to direct them as to the court in which their suit should be brought than that furnished by the fourth article of the act concerning practice in civil cases. (R. C. 1855, p. 1221.) The third section of that act prescribes that suits concerning real estate, or whereby the same may be affected, shall be brought in the county within which said real estate or some part thereof is situate. As this was an original suit, the fact as to the manner in which the land affected by it was acquired could have no influence in determining the question of jurisdiction. It is sufficient that the land is situate in the county in which the suit is brought, without any inquiry as to the means by which it was obtained.

Reversed and remanded; Judge Richardson concurs. Judge Napton absent.

Balentine v. Pratt.—Coffee's Adm'rx v. Crouch.

BALLENTINE *et al.*, Plaintiffs in Error, v. PRATT, Defendant
in Error.

1. Judgment affirmed.

Error to Linn Circuit Court.

Shackelford and *Turner*, for plaintiffs in error.

E. B. Ewing, (attorney general,) for defendant in error.

SCOTT, Judge, delivered the opinion of the court.

The instructions have been examined, as well those for the plaintiffs as that for the defendant. The instructions correctly stated the law of the case, and as there was contradictory evidence, it was for the jury to determine its credibility.

Affirmed; Judge Richardson concurs. Judge Napton absent.



COFFEE'S ADMINISTRATRIX, Defendant in Error, v. CROUCH,
Plaintiff in Error.

1. If one comes into the possession of trust property, whether by suit or otherwise, he will hold it in trust for the *cestui que trust*.

Error to Newton Circuit Court.

Demurrer to a petition. The following is the petition :
"Plaintiff states that one Nathaniel W. Coffee departed this life in Overton county, in the state of Tennessee, some time in the month of August, in the year 1833, and left at his death a son, to-wit, Granville Coffee, who was his only heir and distributee. Plaintiff further states that the said Nathaniel at the time of his death was the owner of and had in his possession a negro girl named Letty, and a considerable amount of other personal property; that afterwards, to-wit, on the 4th day of November, 1833, Martha Coffee and Ben-

Coffee's Adm'rx v. Crouch.

jamin Gobbert obtained letters of administration on the estate of the said Nathaniel Coffee, deceased, and that the said Martha Coffee took said estate into her possession, which said estate consisted of bonds, notes and accounts, and the negro girl above stated, and other personal property. Said plaintiff states that the said Martha Coffee collected the said bonds, notes and accounts due and owing to the said estate, and out of the money collected from said bonds and on or about the — day of May, 184—, purchased and paid for a negro boy named Jorden and a negro girl named Maria, and the said Martha afterward brought said negro to the county of Newton, in the state of Missouri. Plaintiff states that afterwards, to-wit, on the 12th of October, 185—, the said defendant Milner F. Crouch, as administrator of the estate of one George Barker, deceased, (with whom the said Martha had intermarried) brought suit against Martha Barker in the circuit court of Newton county, Mo., for the value of the negroes above named and also for the value of a negro boy named Irwin, who was a child of the said negro girl Letty and born after the death of the said Nathaniel Coffee, and also a child of said negro girl Maria. Plaintiff further states that the said Crouch, as administrator aforesaid, afterwards, to-wit, on the 5th day of November, 1853, recovered judgment in said suit against Martha Barker in the said Newton circuit court for the value of the said negroes, amounting to the sum of \$2,604.50, and afterwards, to-wit, on the 4th day of May, 1855, the said Martha Barker paid unto the said Crouch the principal and interest of said judgment, amounting to the sum of \$2,850.16; which amount the said Crouch now has in his possession. Plaintiff further states that the said Granville Coffee departed this life on or about August 13, 1853, in the county of Newton aforesaid, and that the said Granville, at the time of his death, was a minor under twenty-one years of age; that said plaintiff on the 1st of November, 1854, obtained from the judge of the probate court of Newton county letters of administration on the estate of the said Granville Coffee, which letters are herewith filed. Your

Coffee's Adm'rx v. Crouch.

petitioner asks that she, as administratrix of the estate of the said Granville Coffee, have judgment against the said M. F. Crouch for the said sum of \$2,850.16 and interest thereon, and that the defendant be enjoined and restrained from paying over the amount of said judgment and interest thereon, recovered by him on account of said judgment, to the heirs and distributees of the said George Barker."

The court overruled a demurrer to this petition and gave judgment "that the plaintiff have and recover of and from the defendant the sum of \$3,297.16, and also her costs," &c.

Wright and Edwards, for plaintiff in error.

I. The demurrer should have been sustained. The petition does not state facts sufficient to give plaintiff as administrator of the estate of Granville Coffee a right of action against defendant, either in his individual capacity or as administrator of the estate of said George Barker, deceased. The suit and judgment are against defendant in his individual capacity. This is not authorized by the facts stated. The heirs of George Barker should have been made parties to this suit. It does not appear that said negroes belonged to said Granville Coffee, or that he ever had any right to said judgment, either in law or equity. The petition does not state any fact making defendant individually liable. The suit is brought as administratrix and the judgment is in her favor individually.

Scott, Judge, delivered the opinion of the court.

The proceedings in this case are not remarkable for their regularity, but we are not prepared to say that substantial justice has not been done by the judgment of the court below. The defendant has no right whatever to the money or property in controversy. His intestate Barker only claimed the fund as trustee, and why suffer the defendant, claiming as Barker's administrator, to hold it against the *cestui que trust*? The fact that the money and property were recovered from the plaintiff (Mrs. Barker) by the defendant Crouch, as ad-

Anthony v. Ray & Somerville.

ministrator of her husband, is no defence for him in this suit. If he sued for and recovered trust property, he is a trustee. The circumstance that the present plaintiff was the defendant in that suit can make no difference, as she did not then claim the property as *cestui que trust*, but has since become entitled to it. As administrator of Barker, Crouch had nothing to do with funds which he held as trustee. It does not appear on what grounds Crouch recovered a judgment against the plaintiff Mrs. Barker. If one comes in possession of trust property, whether by suit or otherwise, he being a volunteer will be affected with the trust as to the *cestui que trust*. If at the time of the suit against Mrs. Barker (the plaintiff) she wrongfully held the trust property, and Crouch, the defendant, having the legal title, recovered it from her, he would still hold it subject to the trust. In this view we can see no objection to the judgment against him personally. By bringing the suit he accepted the trust, and having possessed himself of the trust fund, there is no hardship in holding him personally liable, especially as it does not appear that he appropriated the property in any way to the benefit of Barker's estate. (Valingen's Adm'r v. Duffy, 14 Pet. 282.)

The judgment will be affirmed; Judge Richardson concurs. Judge Napton absent.

ANTHONY, Plaintiff in Error, v. RAY & SOMERVILLE, Defendants in Error.

1. S. & R. were partners. A. was security for S. for \$804; R. was also security for S. for \$695. S., to secure A. and R. against these liabilities, executed to A. and R. a mortgage of his interest in the partnership effects, consisting of lands, goods, accounts, &c., with authority in A. or R. or either of them to take possession, and, in the event of default of payment of the secured debts by S., to apply the property or its proceeds to their payment. R. at the same time gave to A. a separate obligation in writing by which he stipulated that the debt for which A. was bound should be first paid out of the mortgaged property, and also gave him verbal assurances that the property was amply sufficient for this purpose. R. took sole possession of the mort-

Anthony v. Ray & Somerville.

gaged property, but paid no portion of the debt for which A. was security ; he did pay off a portion of the debt for which he, R., was security, and refuses to render any account of the partnership. S. is insolvent. *Held*, in a suit instituted by A. against R. and S. for the purpose of obtaining a due appropriation and management of the mortgaged property, that S. was properly joined as a party defendant to such suit ; that it was not necessary, in order to enable A. to maintain such suit, that he should first pay off the debt for which he was security ; it was sufficient if there was reason to apprehend a misappropriation of the mortgaged property or its conversion to uses other than those provided for in the mortgaged deed ; that it constituted no legal impediment in the way of the maintenance of such a suit by A. that he had acquiesced in the exclusive possession and management of the property by R. ; that R. having taken possession of the property and entered upon the discharge of the trust imposed upon him by the mortgage and his agreement with A., neither he nor S. could set up that the mortgage was void for uncertainty in the description of the property.

Error to Buchanan Court of Common Pleas.

Gardenhire, for plaintiff in error.

I. Ray also being a mortgagee of this property and having taken it into his possession immediately after the mortgage was given, and not as the mortgage authorized him when the notes became due, was properly made a party defendant in this suit. It seems that ample time had elapsed for him to have paid these debts, had he been disposed to do so. On the contrary, he does not appear to have attempted any thing of the kind, but was treating the property as his own. Somerville was also properly made a party defendant, because he was a party in interest, and was entitled to the surplus, if any remained, of the proceeds of the property after the payment of the debts for which the mortgage was given. The condition of the mortgage deed was such that Anthony had the right to take possession of the mortgaged property immediately in default of payment of the note of which Anthony was security by Somerville ; and having the right to the possession of the property, he had a right to maintain an action against any person who prevented him from taking possession. The rule of law is clear that a security is not ordinarily entitled to a judgment against his principal until he has paid the debt for which he is security, but the condition of

Anthony v. Ray & Somerville.

the mortgage deed, giving Anthony the right to the immediate possession of the property on the failure of Somerville to pay the note, exempts Anthony from the operation of this rule. The mortgage is sufficient to convey to Anthony and Ray whatever interest Somerville had in the mortgaged property, and even if the mortgage was insufficient as to creditors and others who were not parties to it, yet it would still be sufficient and binding on Somerville, Anthony and Ray, who were all parties to it.

Loan, for defendants in error.

The demurrer was properly sustained. There was a misjoinder of parties defendants. If this was a proceeding to foreclose the mortgage, Ray should have been made a co-plaintiff or the excuse alleged why he was not joined as such. If it was intended to call Ray to an account for an improper disposition of the mortgaged effects, then Somerville is improperly joined as a co-defendant; or if it seeks to render Ray liable on his contract, as certain allegations in the petition indicate, it is equally clear that Somerville was improperly joined as a co-defendant with Ray. By the allegations in the petition it is shown that the paper purporting to be a mortgage is void for uncertainty. The petition alleges that Somerville, by the mortgage, conveyed all the real estate to which he might be entitled that was held in the name of Ray and Somerville, and the interest of Somerville in the partnership effects of Ray and Somerville which were remaining after the partnership debts then contracted had been paid. No specific property is described, and the petition fails to allege that any such property existed after the partnership debts had been paid. Whilst it may be conceded that the mortgage, by the description therein, might be sufficient to transfer Somerville's interest, yet in a petition seeking relief and founded upon rights derived under the mortgage, it is essential to aver what those rights are which the grantees took and are entitled to under the mortgage, and wherein the plaintiff has been injured by their detention. The peti-

Anthony v. Ray & Somerville.

tion fails to state that the plaintiff has paid the note or any part thereof for which he was Somerville's security, or that he has sustained any loss or injury by reason of his suretyship. If the plaintiff has not been injured he has no right to relief and ought not to complain.

NAPTON, Judge, delivered the opinion of the court.

The facts of this case, as assumed in the petition, are these : Somerville and Ray were partners. Anthony, the plaintiff, was security for Somerville for about \$804, and Ray was also his security for about \$695. Somerville, to secure these liabilities, executed to Anthony and Ray a mortgage of his interest in the partnership effects, consisting of lands, moneys, goods, accounts, &c., with authority in Anthony and Ray, or either of them, to take possession, and, in the event of Somerville's not paying off these debts for which the mortgages were bound as securities, to apply the property or its proceeds to their payment. At the same time Ray gave to the plaintiff a separate obligation in writing, agreeing that the debt for which plaintiff was bound should be first paid out of the mortgaged property, and Anthony the plaintiff received also the verbal assurances of Ray that this property was amply sufficient for this purpose. Ray took sole possession of this property. The note for which plaintiff became security has been long since due, and Ray has paid no part of it, but has, it is charged, paid off a portion of the \$695 note with it, and refuses to give any account of the partnership. Somerville is insolvent. The prayer is for discovery of the condition of the partnership, the amount of the mortgaged property, what has become of it, and an appropriation, or security for its due appropriation, to the payment of the \$804 debt. To this petition there was a demurrer and the demurrer was sustained.

The principal objections to this petition are, that Somerville is an improper party ; that there is no allegation that plaintiff has himself paid off the \$804 note ; that the mort-

Anthony v. Ray & Somerville.

gage was void for uncertainty ; and that the bill is a *fishing bill*, not sufficiently pointing out any substantial grounds of complaint, or showing very clearly what distinct relief is desired.

In relation to the alleged invalidity of the mortgage, it is sufficient to say that the defendants are not entitled to any such defence. One of them, Somerville, is the mortgagor, and the other is the mortgagee, and took possession of the property and undertook to discharge the trust. It certainly is not competent for Ray to allege the invalidity of an instrument of which he has already availed himself, and under which he has acted, so far, apparently without objection. The creditors of Somerville do not appear to object, and it is not for the mortgagee or trustee and the mortgagor to make such an objection. Whether the description of the property is sufficient or insufficient is, therefore, a matter of no importance in this case.

We are not of opinion that it was necessary for the plaintiff to pay off the \$804 debt before he could have the relief sought for in this petition. This is not a suit by a security to obtain a general judgment against his principal, in which he must of course first show that he has satisfied the debt. But the proceeding is to prevent anticipated mischief, some future injury to his rights. It is in the nature of a bill *quia timet*, of which Judge Story says: "The object of the bill in all such cases is to secure the preservation of the property to its appropriate uses and ends, and, wherever there is danger of its being converted to other purposes, diminished or lost by gross negligence, the interference of the court becomes indispensable. It will accordingly take the fund into its own hands, or secure its due management and appropriation, either by the agency of its own officers or otherwise. Thus, for instance, if property in the hands of a trustee for certain specific uses or trusts, either express or implied, is in danger of being diverted or squandered to the injury of any claimant having a present or *future fixed title* thereto, the administration will be duly secured by the court, accord-

Morris v. Morris.

ing to the original purposes, in such a manner as the court may, in its discretion, deem best fitted to the end—as by the appointment of a receiver, by payment of the fund (if pecuniary) into court, or by requiring security for its due preservation and appropriation.” (Story on Eq. § 827.) In this case, Somerville, the principal debtor, is insolvent, the debt has been due for some time, the mortgaged property has not been applied to its extinguishment, but on the contrary has been used to pay off another debt not properly chargeable to this fund until an entire satisfaction of plaintiff’s demand; and this is the only fund to which the plaintiff can look for relief. He has a right to see that it is duly administered by the trustee to whose charge it has been confided. He was a joint trustee himself with Ray, but he has thought proper to acquiesce in the exclusive possession and management of Ray; but by this course he has not lost his right to call upon Ray for an account of this trust. Whether the court would, under the circumstances, appoint a receiver or not, can not be now foreseen. That is very much a matter of discretion with the court, and of course must depend on the facts which transpire at the hearing of the case.

Somerville was properly made a party, for two reasons: first, he may ultimately be entitled to any surplus of the mortgaged property, and, secondly, he has at all events a right, as the principal debtor, to see that his burdens are not improperly increased.

Upon the whole, we do not see any substantial objections to this petition, and think the defendants should have been made to answer. Judgment reversed and remanded; Judge Richardson concurring.



MORRIS, Defendant in Error, v. MORRIS, Plaintiff in Error.

1. Where a cause is properly triable by the court, the parties are not entitled as a matter of course to have issues framed and submitted to a jury. The cases in which it is peculiarly appropriate to direct issues to be submitted

Morris v. Morris.

to and tried by a jury are those in which single material facts are disputed and the evidence is conflicting.

2. Issues submitted to a jury should be framed in language plain and perspicuous.
3. Instructions given to a jury should contain no comments on the evidence.
4. Resulting trusts are not within the statute of frauds.

Error to Lawrence Circuit Court.

This was an action by Jesse E. Morris against Zachariah Morris, John P. Campbell, L. J. Morrow and W. Morrow. Campbell died and the suit was finally dismissed as to all the defendants except Zachariah Morris. The plaintiff in his petition set forth in substance that one Robert Morrow entered a certain tract of land in the land office; that at the time of the entry by Morrow plaintiff was in possession of said land and had a portion thereof in cultivation and had improvements; that afterwards the plaintiff purchased said land from said Morrow, and was to pay him therefor the money the latter had paid upon its entry, with interest thereon; that plaintiff employed one Asa Smith to accompany said Morrow to the town of Springfield to pay said Morrow the purchase money and get a deed from Morrow to the plaintiff; that he instructed them to apply to John G. Campbell to write the deed and attend to the taking of the acknowledgment; and that he would pay Campbell for his trouble and expenses; that Smith as agent of the plaintiff paid said Morrow the said purchase money; that Morrow agreed to make and deliver a deed to plaintiff and leave the same with Campbell; that Campbell fraudulently inserted his own name in said deed; that Campbell conveyed said land to Zachariah Morris, who took with notice. Plaintiff prayed for a decree of title.

The following issues were submitted to the jury: "1st. Did plaintiff purchase the land in question, and procure John G. Campbell to write the deed, pay the purchase money, and have possession of the land at and before the purchase? 2d. Had the defendant notice that plaintiff had purchased said land from Morrow and procured Campbell to write the deed

Morris v. Morris.

previous to the defendant's purchase from Campbell? 3d. Had plaintiff possession of the land when Morrow executed the deed to Campbell?" All these issues were found for plaintiff.

Crawford, Edwards & Ewing, for plaintiff in error.

I. Campbell's heirs should have been made parties to the suit, because, if the facts set forth in the bill are true, Zachariah Morris would have a remedy over against them in the event that Jesse Morris succeeded, and they should have been parties. Plaintiff in this bill does not aver that he paid Smith the purchase money to pay to Morrow, nor does he aver that the money paid to Morrow for the land was his money. The facts are not sufficiently stated to take the case out of the statute of frauds. (See *Johnson v. Magruder*, 15 Mo. —.) The proper issues were not presented to the jury. Defendant relied upon the statute of frauds as to the alleged purchase of Jesse Morris from Morrow, but such issue was [not] presented to the jury by the court. Every issue presented in the case may be found for the plaintiff and still the plaintiff would not be entitled to recover. The statute of frauds was well pleaded to the action. There is no pretence that the contract between Jesse Morris and Morrow was in writing; and the plaintiff fails to make such a case as will take the case out of the statute of frauds. The court erred in refusing to permit the witness to answer the question put in relation to the general character of A. Z. Smith for truth and veracity. The court erred in giving the instructions asked by the plaintiff. They were not warranted either by the evidence or the law.

Scott, Judge, delivered the opinion of the court.

If J. P. Campbell loaned the money to Smith with which he says he paid for the land and took the deed in his own name for his indemnity by an arrangement with Smith, who was the agent of the plaintiff, then it would seem that this action has been misconceived, as the plaintiff could not ex-

Morris v. Morris.

pect to recover without reimbursing Campbell or those claiming under him. The testimony of Smith as preserved in the record is very unsatisfactory. He does not say who furnished the money which he paid for the land. Whether, by contract with the plaintiff, Smith was to furnish the money for him or whether the plaintiff himself put the money in Smith's hands, does not appear. If Campbell loaned the money and had to take a deed in his own name for his security, that is no reason why he should not be paid for writing the deed. It does not appear but that there may have been an arrangement with Campbell for the loan of the money with the privity of the plaintiff. The father of the plaintiff testifies that Campbell, before his conveyance to the defendant, told him that he had no claim to the land in controversy, but another witness stated that the plaintiff told him that he had been wronged by Smith. The evidence in relation to the character of Smith was all-important and should not have been excluded.

The issues in this case were very bunglingly framed. It seems they were filed after the jury was sworn, but by whom the record does not inform us. It does not appear whether the court directed them or not. The case was properly triable by the court, and when cases are so directed to be tried, it is not for the parties, as a matter of course, to require a jury. The court has a discretion and should exercise it in order to determine whether the case is a proper one for a jury. We know that there are a great many cases which can with no propriety be tried by a jury. When a single material fact is disputed in a cause and the evidence is contradictory, courts will direct it to be tried by a jury; but these cases half tried by a court and half by a jury are always in perplexity and confusion. Judges should not relieve themselves by throwing the responsibility of trying causes on juries when the law contemplates that the duty shall be discharged by themselves.

The first issue is defective because it is so worded that it does not appear whether the payment of the purchase money

therein mentioned was by Campbell or by the plaintiff. It is a matter of uncertainty whether the jury was directed to find whether the plaintiff or Campbell paid the purchase money. It is not maintained that it may not be conjectured what the language means or what was intended, but issues submitted to a jury should be in language so plain and perspicuous that no doubt could arise as to their meaning.

The second issue directs two facts to be found, neither of which disposes of the cause, nor both together; but, if found, merely serve as the ground-work of an inference which, if it existed, would be material in determining the controversy. This is rendered plain by the instruction given by the court, and which instruction is objectionable, as it amounts to a comment on the evidence, which the court by statute can not make but by consent.

The third issue related to the possession of the land in controversy. We do not see how the matter of possession is material in this suit. The defendant did not pretend any title to the land before his purchase from Campbell. There is no pretence that the statute of limitations has any application, or, if it has, it has not been suggested anywhere in the record. How then can the fact of possession affect the merits of the controversy? Of what avail could it be as notice, as no title previous to the defendant's purchase is claimed for him? The plaintiff must show fraud in Campbell before he can succeed, and if such fraud is established, how can the defendant's possession help him as he claims under Campbell?

The case of the plaintiff proceeds on the hypothesis that Campbell having in bad faith procured the legal title to the land, a trust results to him to have the title reconveyed. It is very clear under this view that the statute of frauds has nothing to do in determining this controversy, as it is well settled that resulting trusts are not within the statute of frauds and perjuries.

As the judgment will be reversed it will be needless to review the instructions. They are not very perspicuous, and

Wood v. Phelps County Court.

would serve rather to confound a jury than to aid them in their deliberations. When the law is so plain, what can be the object of many instructions? When each party takes extreme views of the law of a case, why not reject both sets of instructions and frame such as will fairly set forth the law? From what has been said, the burden, it is obvious, is on the plaintiff to show that Campbell acquired the legal title to the land in dispute in bad faith or in fraud of the rights of the plaintiff knowingly, and that the defendant took a conveyance from Campbell with the knowledge of the bad faith or fraud on his part in acquiring the title. The character of the parties to this transaction, actors and witnesses, must and should have influence in determining it. That is not a matter for this court. It is for those who may have known them and may hear the witnesses testify.

Judgment reversed and remanded; Judge Richardson concurs. Judge Napton absent.



WOOD *et al.*, Appellants, v. PHELPS COUNTY COURT, Respondent.

1. Granting that an appeal would lie from the judgment of a county court in a proceeding instituted to obtain a removal of the seat of justice, it would only lie in the case of a final judgment.
2. Neither under the general act regulating the removal of seats of justice (R. C. 1855, p. 513), nor under the act organizing Phelps county (Sess. Acts, 1857, Adj. Sess. p. 397) would an appeal lie to the circuit court from an order of the county court sustaining or overruling a motion to set aside or vacate a former order of the county court approving the location of the seat of justice.
3. Where a public act requiring the exercise of judgment is to be performed by several commissioners appointed in a statute, all of them must meet and confer.
4. Though a majority of the commissioners appointed by the act organizing Phelps county (Sess. Acts, 1857, Adj. Sess. p. 397) may make a location of a seat of justice, yet all the commissioners appointed must meet and confer with respect to such location.

Wood v. Phelps County Court.

Appeal from Phelps Circuit Court.

Parsons & Pomeroy, for appellants.

I. The county court had no right to reject the petition for the removal of the county seat. The circuit court committed error in dismissing the appeal. The commissioners gave no notice of their intended meeting. The general law requires such notice. The law required all the commissioners to qualify. The circuit court should have heard *de novo* the petition of the inhabitants for the removal of the supposed county seat, as also their objections to the location. (R. C. 1855, p. 533, § 8.) Three-fifths of the taxable inhabitants of the county are appellants here.

E. B. Ewing, (attorney general,) for respondent.

I. The petitioners were not entitled to an appeal. The circuit court did right to dismiss it. (*Tetherow v. Grundy County*, 9 Mo. 118.) Neither the statute concerning the organization of counties nor that concerning seats of justice authorizes an appeal. (R. C. 1855, p. 504, 513.) See also act to organize Phelps county. There was no final judgment of the county court from which an appeal would lie. But if the proceedings of the commissioners were in any respect irregular, such irregularity could not be remedied by an appeal. The commissioners or a majority of them were required to report their proceedings to the county court, not the circuit court. But if the general law concerning the organization of counties governed the commissioners in the discharge of their duties, there is no such irregularity as invalidates their proceedings. (Act concerning the organization of counties, R. C. 1855, p. 505-6.) It devolved upon the plaintiffs to aver and prove facts that would invalidate the proceedings of the commissioners. This nowhere appears from the record.

RICHARDSON, Judge, delivered the opinion of the court.

By the second section of the act organizing Phelps county, approved November 13, 1857, George M. Jamison, of Craw-

Wood v. Phelps County Court.

ford county, Cyrus Colley, of Pulaski county, and Gideon R. West, of Osage county, were constituted a board of commissioners to locate the seat of justice of Phelps county, and were instructed to locate it at the most suitable place in the county on the line of the survey of the south-west branch of the Pacific railroad. The seventh section of the act required the commissioners to meet at the residence of John Webber, in said county, on the 30th of November, 1857; or on any other day thereafter that a majority of them might name, and proceed to locate the county seat and report the same to the county court. The seventh section further provided that a majority of the commissioners should be sufficient to make a location, but should one or more of them fail to act for any reason, it should be lawful for the county court of the county in which such delinquent commissioners resided to supply the place by appointment.

It appears from the record that on the 20th January, 1858, Cyrus Colley and George M. Jamison reported to the county court that they had located the county seat on a tract of land described in a deed, which they presented, executed by Edward W. Bishop, and on the next day the report was approved by the court. It does not appear on what day the commissioners met for the purpose of entering on the performance of their duty, but it was shown that Gideon R. West, of Osage county, failed to qualify or to act; that the other commissioners had no communication with him on the subject of the location, and that only two of them ever qualified or acted in making the location. On the 9th February, 1858, a petition was presented to the court, purporting to be signed by James Woods and 615 other tax payers of the county, complaining of the action of the commissioners in locating the county seat and asking the court to make an order to remove the seat of justice to another place, and at the same time a motion was filed, grounded on the petition, for the appointment of five commissioners to select another site. Seventeen reasons are assigned in the motion, many of which are inconsistent with each other, for some of them assume

Wood v. Phelps County Court.

that the county seat had never been located at all, inasmuch as the proceedings of the commissioners were irregular and void; whilst others concede that it had been lawfully established, but urged that it ought to be removed to another place, because it was unwisely located and a majority of the tax payers were dissatisfied and desired a change. On the 10th February, Hamilton Lenox and others filed their remonstrance against the removal of the county seat, and the matter was continued until the 22d day of the month, when it was again continued until the next term of the court. On the 24th February the following entry appears: "Now on this day come the petitioners by their counsel and present their motion to the county court for an investigation of the alleged illegality of the location of the county seat of Phelps county, which motion is by the court overruled; whereupon said petitioners gave notice of an appeal;" and thereupon the case was taken by appeal to the circuit court. The motion mentioned in the entry is not set out in the record, and we can not tell either its aim or the reasons stated in it, and it does not appear that it sought to have the order of the court approving the report set aside; but that it only asked "for an investigation of the alleged illegality of the location of the county seat." The circuit court dismissed the appeal.

It is evident that an appeal did not lie from any order the county court had made touching the petition to remove the county seat, for no final decision had been made by the court on the subject. The petition had been neither granted nor refused, and before the appeal was taken an order had been made continuing the matter until the next term; and if an appeal will lie at all from the judgment of the county court in a proceeding to remove a county seat, it would only lie in the case of a final judgment.

The proceedings of the appellants in the county court were intended in the beginning only to procure the removal of the county seat according to the provisions of the act to provide for the removal of seats of justice. (R. C. 1855, p. 513.) There is nothing in the record to show that a motion was

Wood v. Phelps County Court.

made at any time to reject the report, or to set aside the order approving it, and if the parties designed to take that course, they approached the subject by singular indirection. But treating the case as though a motion had been made in proper form and at the proper time, we do not think an appeal could be taken from an order of the county court sustaining or overruling it. Neither the act organizing Phelps county, nor the general law on the subject of locating seats of justice (R. C. 1855, p. 503), makes any provision for an appeal. One citizen of the county alone surely could not take an appeal, for all the other citizens might acquiesce in the judgment of the court, and if one could not appeal, two could not, nor could three, or any other given number, and therefore the right of appeal can not depend on the number who may unite in it. (*Tetherow v. Grundy County Court*, 9 Mo. 119.)

The judgment of the circuit court dismissing the appeal will be affirmed, but we think it proper to say that, in our opinion, the report of the two commissioners should have been rejected, and the county court ought to vacate the order approving it. Three commissioners were appointed in order that each of them might have the benefit of the advice and information of the others, and it was supposed that their associated counsel and judgment would produce a wiser and more satisfactory result than if only one or two acted. Where a public act requiring the exercise of judgment is to be performed by three or more commissioners appointed in a statute, all of them must meet and confer, though the question may be determined by the opinion of a majority, unless the concurrence of all is required. When all are present and acting, two may decide; but two can not act without at least consulting with the third; for it might happen that if the third one had been present, his opinions and arguments would have influenced the others and changed the result. (Rogers, *ex parte*, 7 Cow. 530, note.) The statute appointing these commissioners permits a majority of them to locate the county seat, but it contemplated that all should meet

Atkisson v. Steamboat Castle Garden.

and confer, for it expressly provides that in case one or more of them should fail to act, the county court of the county in which the delinquent commissioner resided should supply his place by appointing another. The commissioners were not required to make the location within any fixed time, and therefore, as they have not yet discharged the duty assigned them, there is no reason why they may not yet perform it. The county court ought to set aside the order approving the report, and notify the commissioners to proceed to execute their trust; and if the court refuses to do its duty, which we can not suppose it will do, an adequate legal remedy will then doubtless be suggested and adopted. Judge Scott concurs. Judge Napton absent.

ATKISSON, Defendant in Error, v. STEAMBOAT CASTLE GARDEN, Plaintiff in Error.

1. Mere hearsay testimony, the acts and declarations of third persons in no way related to the party against whom it is sought to use them, is inadmissible.
2. In an action against a carrier to recover damages for his failure to transport goods to their place of destination, if the owner seeks to recover the value of the goods at the place of destination, the freight that would have been earned by the carrier in transporting the goods to their place of destination must be taken into estimation and allowed the carrier.
3. If a carrier deliver goods at their place of destination after the appointed time, the acceptance of them by the owner will not discharge the carrier from liability for the breach of his contract; so the acceptance of goods from a carrier at a place short of their place of destination will not absolve him from liability for a breach of his contract committed before delivery; in such cases, the carrier is exempt from damages only where there has been no breach of the contract previous to the delivery of the goods.

Error to Camden Circuit Court.

This was an action against the steamboat Castle Garden to recover damages for the breach of a contract to transport certain goods, wares and merchandise from St. Louis to Warsaw, on the Osage river, and to tow a flat-boat loaded with

Atkisson v. Steamboat Castle Garden.

whisky and lumber from the mouth of the Osage to said Warsaw. Neither the goods nor the flat-boat were taken to their place of destination, but were delivered at a point short thereof after a detention of a considerable time and in a damaged condition.

Edwards and Ewing, for plaintiff in error.

I. The court erred in admitting the evidence of Jopling contradicting his receipt, given by him while acting as agent of the plaintiff, for the flat-boat, whisky and plank. The court erred in overruling the objections by defendant to the evidence of W. E. Tutt. The court erred in permitting the instrument of writing signed by Lyle to be read to the jury. The court erred in giving the third, fifth and seventh instructions asked by the plaintiff. The court erred in giving the third, fifth and seventh instructions asked by plaintiff as to the measure of damages. The court should have refused those asked by the plaintiff as to the measure of damages, and given those asked by the defendant on that question. The court erred in refusing the fourth and sixth instructions asked by the defendant.

F. P. Wright, for defendant in error.

I. The instructions Nos. 3, 5 and 6, given on the part of the plaintiff, are correct. The fourth instruction asked by defendant was properly refused, and particularly as by instruction eleven the court excluded from the consideration of the jury all admissions and declarations of the clerk of the boat except such as were made by the clerk while the goods were in his immediate possession or under his control as clerk. Declarations and admissions made by an agent are competent; they in fact constitute a part of the *res gestæ*. (Story on Agency, § 134, 135; 1 Stark. Ev. 35.) The sixth instruction asked by defendant was properly refused. There is no evidence that Atkisson gave Jopling any such authority as assumed by the instruction. The law would not imply it. The receipt was written by the agents of the boat, and con-

Atkisson v. Steamboat Castle Garden.

tained statements known by them to be untrue, with the fraudulent intent of screening the steamboat from its liability, and admissions thus fraudulently obtained were not binding on Atkisson. Taking the instructions all together, the criterion of damages was properly stated. Plaintiff's fifth and sixth instructions, as to the damages for property lost, used and destroyed by defendant, were sufficiently favorable, and the eighth instruction on the part of the defendant was too favorable for defendant. When goods are entrusted to a carrier and they are not delivered according to contract, the value of the goods with the interest thereon from the day they should have been delivered at the place of destination is the measure of damages. (Sedgwick on Damages, p. 372; Shaw & Austin v. S. C. R. R. Co. 5 Pick. 462; 14 Ill. 156; Bailey v. Shaw, 4 Foster, 297.)

SCOTT, Judge, delivered the opinion of the court.

The judgment in this case must be reversed, if for no other reason than on account of the error in admitting as evidence the paper headed "sold J. F. Weidemeyer." This paper contained the amounts of the various bills of the goods shipped on the "Castle Garden," which were alleged to have been made with different merchants in St. Louis, with freight, insurance and ten per cent. added to the cost. There was no evidence of the authenticity of these bills or of their correctness. The witness Tutt merely stated that the plaintiff had made a contract to sell said goods to Weidemeyer before they were sold to McClung and whilst the said merchandise was on said "Castle Garden" on her way to Warsaw. The paper was then read with proof of the signature of Weidemeyer, which was subscribed, after the institution of this suit, to an acknowledgment at its foot, to the effect that he had bought the within bills of goods from Jas. Atkisson, at the prices, &c., named. So it would seem that this evidence was made for the cause. The offers, acts or declarations of Weidemeyer could not be made evidence against the defen-

Atkisson v. Steamboat Castle Garden.

dant, as they were not under oath. If his evidence was necessary, he should have been produced as a witness. There is no attempt on the part of the plaintiff to defend or even explain this departure from the rules of evidence.

We do not understand the seventh instruction given for the plaintiff. Its object is not perceived. If it was intended to give the measure of damages in an action for a breach of the contract of affreightment, it failed of its end. Neither did the fifth instruction given for the plaintiff state correctly the measure of damages in cases where a carrier fails to transport goods from one port to another in pursuance to the terms of his contract. The rule, as settled in such cases, as to the measure of damages, is the value of the goods at the place of destination, deducting freight and other expenses of transportation; for the shipper of merchandise would have to pay freight to the port of destination in order to obtain its value at that place; and if it never was delivered and no freight was paid in respect to it, if he would have the value at the place of destination, he must deduct the freight and expenses that would have been expended had the goods been delivered at the appointed place. (*Nourse v. Snow*, 6 Maine, 208; *Watkins v. Laughton*, 8 John. 213; *Angel on Carriers*, § 482; *Sedgwick on Damages*, 372.) So if the carrier earns freight in respect to the goods by carrying them to the port of destination, but not as required by his undertaking, or to a point short of it from which they were or might have been carried at a less expense by using ordinary diligence, the freight that was or might have been earned will be allowed to him. (*Sedgwick on Damages*, 372; *McGregor v. Kilgore*, 6 Ohio, 143.) The allowance of interest in these cases depends on circumstances, and will be given or withheld accordingly, as in all other cases of unliquidated damages.

We do not see that there was any error in admitting in evidence the paper signed by Lyle at the time he discharged the cargo at Linn creek; that paper contained nothing more than the declaration of the law of the case. If goods are to be delivered at a certain time, and they are delivered and ac-

Atkisson v. Steamboat Castle Garden.

cepted after the time appointed, the carrier is not thereby discharged from the payment of damages for the violation of his contract unless it is so agreed. So if goods are shipped on a voyage and the owner agrees to receive them at a place short of the port of destination, that will not free the carrier from the responsibility of damages incurred by a breach of the contract of affreightment made by him before the delivery of the goods at the intermediate place. In such cases the carrier is only exempt from the payment of damages when there has been no breach of the contract previous to the delivery of the goods. (Angel on Carriers, § 336 ; Bowman v. Teoll, 23 Wend. 306.)

There was no error in permitting the witness Jopling to explain the circumstances under which he gave the receipt for the goods at the mouth of the Osage. It would be strange if the law were otherwise. If one obtain money from another for the delivery of property which is unjustly withheld, the money may be recovered back. If one tampers with the agent of another and induces him to do an act in the name of his principal which he has no authority to do, can not the circumstances be shown in order to invalidate the act ? The defendant would induce the agent of another to give a false receipt in his name without authority, and then maintain that the facts can not be inquired into because the act of the agent is the act of the principal. This argument amounts to nothing more than the illogical *exceptio ejusdem rei, cujus dissolutio petitur*.

The court admitted the declarations of the agent of the boat. Some of these declarations were evidence and some were not. Exceptions were taken to the admission of these declarations and they were admitted against the exceptions. Afterwards the court gave an instruction that all the declarations and admissions of the clerk of the boat, except such as were made by the clerk while the goods were in his possession or under his control, were excluded from the consideration of the jury. Under these circumstances, it would have been better had the court informed the jury specifically

Bray v. Thatcher.

what declarations were withdrawn and what were not. It was an unsatisfactory way of avoiding the consequence of the admission of illegal evidence. If all the declarations had been withdrawn such a course might have been well enough, but to receive good and bad indiscriminately, and then leave to the jury to determine, though under an instruction, what should and what should not be excluded, was certainly a very unsatisfactory way of disposing of the matter.

As the judgment will be reversed, it is unnecessary to say any thing in relation to the instructions as to the measure of damages for not delivering the whisky or lumber. It is obvious that that rule is applicable to them which fixes the measure for the merchandise.

Reversed and remanded; Judge Richardson concurs. Judge Napton absent.



BRAY, Respondent, v. THATCHER *et. al.*, Appellants.

1. Where a plaintiff seeks relief other than the recovery of money only or of specific real or personal property—as where the annulment of deeds is sought on the ground that they were obtained by duress and violence—the cause must be tried by the court and not by the jury.
2. A. and B. combining, by threats of violence against C., extorted from the latter the transfer to themselves of a certain tract of land owned by the latter—one portion thereof being conveyed to A., and the other to B.—A. conveyed his portion to D., who took with notice. C. instituted an action against A., B. and D. to obtain an annulment of said deeds. *Held*, that the petition was not multifarious.
3. Courts of equity will set aside deeds obtained by duress.

Appeal from Mercer Circuit Court.

This was an action by Hardin P. Bray against Daniel N. Thatcher, Lilburn P. Smith and Azariah L. Hupp. The plaintiff set forth that on the 5th of January, 1852, he owned in fee simple a specified tract of land; that on said day “one Daniel N. Thatcher and one Lilburn P. Smith, together with divers other persons, riotously assembled themselves together

Bray v. Thatcher.

for the purpose of compelling plaintiff to make to said Thatcher and Smith a deed to the above described tract of land, and by divers threats and menacings toward said plaintiff, of and by said parties when so assembled, of great personal injury to the person of said plaintiff and of his life ; that by such threats and menacings, with force and violence toward plaintiff, the said plaintiff, through [fear] of his life or of some great bodily injury and personal indignity and violence to his person, did, although against his will and without his consent, sign and acknowledge deeds" -- one to Thatcher for one-half of the above mentioned tract, and the other to said Smith for the other half -- "for the nominal sum of fifty-two dollars and fifty cents paid by each of said parties ; which said sum so paid was fixed and set by said parties, so threatening and menacing plaintiff as aforesaid, of their own arbitrary will and without the consent of plaintiff ; all of which plaintiff was compelled to agree to and accept against his will, through fear of his life and great bodily injury to his person ;" that afterwards, on the 23d of February, 1853, the said Thatcher conveyed the tract of land conveyed to him to one Azariah L. Hupp ; that said Hupp well knew that the deed from plaintiff had been procured by force and violence and through fear. The plaintiff prays the court to set aside the deeds of plaintiff to Thatcher and Smith, and that from Thatcher to Hupp, and for a decree of title in himself. The plaintiff brought into court the sum of one hundred and five dollars, so paid to him by Thatcher and Smith, and offered to refund the same.

The defendants demurred to this petition on the ground of multifariousness. The demurrer was overruled. The cause was submitted under instructions to a jury, who found for the plaintiff.

Davis and Tindall, for appellants.

I. The defendants were improperly joined together in the action, and the court ought to have sustained the demurrer of defendants or afterwards have sustained the motion in ar-

Bray v. Thatcher.

rest of judgment. There is no joint or common interest either in the lands or the possession of the lands, which were the subject of the suit. (See *Stancup v. Garner*, 26 Mo. 72; *Doan v. Holly & Walker*, id. 186; 25 Mo. 359; 3 Barb. Ch. 434; 17 Mo. 228.) A new trial should have been granted on motion of defendants because of giving wrong instructions by the court. A deed which has been acknowledged and recorded will not be avoided upon a plea of duress. (3 Bac. Ab. 255, tit. Duress; 1 Story on Contr. 404.) A fear of injury to a man's person, not amounting to loss of life or or limb, or a mayhem, would be insufficient to invalidate his deed made under such fear. (See 3 Bacon's Abridg. Duress, p. 252; 1 Black. Comm. 131; *Shepherd's Touchstone*, 61.) The latter clause of the first instruction given for plaintiff misled the jury as to the law. The verdict, being general, is not sufficient; it should be special and responsive to the allegations in the petition. By what authority is a judgment entered against Hupp for the land alleged to be conveyed to Smith? (19 Mo. 554.) The court below mistook the law in refusing to compel the plaintiff to elect which of the causes of action he would proceed on first, and to amend his petition. (See *Moony v. Kennett*, 19 Mo. 554.)

Ryland and *E. B. Ewing*, (attorney general,) for respondents.

I. The grounds raised by demurrer can not now be raised here, because the defendants answered and the demurrer must be considered as withdrawn. The court below properly overruled the defendant's motion to elect on which of his causes of action he would proceed, this not being such a case in which such motion can prevail. The instructions for plaintiff were proper, and were in accordance with the law and the facts in proof. There is no multifariousness in the petition, and the issue being found for plaintiff, there was no cause to arrest the judgment. (Story, Eq. Plead. § 284, 286, 283, 534; 6 Johns. Ch. 140; 8 Clark & Fin. 428; 2 Ans. 473.) The proof shows such duress by threats as will war-

Bray v. Thatcher.

rant the court to declare the law to be as laid down in the instructions given, and to set aside the deeds as void.

SCOTT, Judge, delivered the opinion of the court.

This is not an action for the recovery of money only, or of specific real or personal property. The object of the petition is to set aside conveyances of land and procure re-conveyances on the grounds of violence and fraud practiced in obtaining them. Such being the aim of the suit, it was not properly tried by a jury. It is obvious that the responsibility of trying the action has been shifted from the court and imposed on a jury against the provisions of law. It is no answer to this to say that the court may have adopted the finding of the jury as its own, for courts frequently acquiesce in the verdict of juries, where, had they been the triers of the fact, their verdicts would have been different. It is clear that this cause has not been tried by the tribunal appointed by law. There is another difficulty in the way of this proceeding. Causes which by law are to be tried by a jury can only have a misapplication or mistake of the law of the case reviewed in this court by bills of exceptions containing the instructions complained of. In such cases, if there is no bill of exceptions containing the instructions, or if no instructions are asked, and the wrongful misapplication of the law to the facts is the only error of which complaint is made, there can be no reversal; the judgment will be approved. In cases, however, where by the law the trial must be by the court, a majority of this court holds that the case may be reviewed here although no declarations of law as applicable to the facts were made in the inferior tribunal. If a case properly triable by the court is improperly submitted to a jury, what is to be the rule? (R. C. 1855, p. 1261.)

We do not conceive that the petition is obnoxious to the charge of multifariousness. The circumstance that the parties concurred in a joint act which resulted in the injury of which the plaintiff complains distinguishes this from ordinary cases. If the two defendants had taken a joint deed as

Bray v. Thatcher.

the reward of their fraud and violence, there would have been no question as to the propriety of the petition. The fact that they shared the spoil between themselves can not affect the remedy of the plaintiff. If the defendants Thatcher and Smith had passed their titles to innocent purchasers, it is conceived that all the parties to the wrong and violence would *in solido* have been liable to make good the loss sustained by the plaintiff; and being thus liable, there can be no impropriety in joining them as defendants in one action. If by separate acts of violence on separate occasions, by different persons, the plaintiff had been forced to yield up his property, there would have been an impropriety in joining these several causes in one action; but here, as all those of whom complaint is made united in the act causing the injury, they were all jointly liable, and the division of the spoil among themselves can not affect the remedy of the plaintiff.

Whatever may be the law as to the plea of duress when set up as a defence to an action on a bond, it can have no application to this suit, which is one in the nature of a bill in equity to set aside deeds obtained by violence and fraud. But we see no ground on which it can be maintained that the facts in this case would not support a strict plea of duress as framed in the old books of entries. The mob menaced the life of the plaintiff and actually used violence towards him. The defendants were present, adopted and gave countenance to their lawless acts, which were done for their benefit. To hold that conveyances obtained under such circumstances could not be set aside would be a reproach to any system of jurisprudence. The grounds on which courts of equity proceed furnish ample ground to administer to the plaintiff the relief he seeks. Those courts relieve against fraud, violence and imposition; and a grosser outrage than that presented by the record in this case rarely comes under the cognizance of courts of justice. It was a fraud in the defendants to take advantage of the violence of the mob to extort deeds from

Dickerson v. Chrisman.

the plaintiff against his will and on their own terms. For the reason given in the former part of this opinion, the judgment will be reversed and the cause remanded.

DICKERSON, Appellant, v. CHRISMAN, Respondent.

1. Where a suit results adversely to the plaintiff and he becomes liable for costs and judgment is rendered accordingly, it is no error as against him that judgment for costs is also rendered against another irregularly made a party to the suit at the instance of the defendant.
2. Where a deposition is offered in evidence, and its admission is objected to for various reasons, if the objection that the absence of the witness has not been accounted for be not made, it will be deemed to have been waived.
3. Declarations of a grantor of real estate, made before the grant, to the effect that he had previously sold said real estate to another, are admissible in evidence against such grantee and all persons claiming under him.
4. Where there is a parol sale of real estate and the vendee is placed by the vendor in such a situation that a fraud will be worked upon him unless the contract of sale is fully performed, this will be deemed such a part performance as will take the case out of the statute of frauds.
5. The rule that a judgment is an entire thing, and if reversed as to one must be reversed as to all, is only applicable to judgments at law.

Appeal from Moniteau Circuit Court.

This was an action in the nature of an action of ejectment to recover possession of certain real estate in the town of California. The suit was instituted in February, 1856. Plaintiff claims title under a deed from one Browning, dated July 12, 1855, and recorded September 11, 1855. The plaintiff claims also rent from the defendant and compensation for waste. The defendant set up as a defence to the suit that he purchased the property in controversy of said Browning on or about the 1st of May, 1855; that he took possession of the same and paid about eight hundred dollars thereon, leaving the same amount unpaid; that Browning executed and acknowledged a deed of said property to defendant, but fraudulently refused to deliver it; that plaintiff,

Dickerson v. Chrisman.

with full knowledge of these facts, fraudulently contrived and confederated with Browning and obtained a conveyance of the same property to himself. The defendant offered to pay the remainder of the purchase money and prayed for a decree of title against plaintiff and Browning; that Browning be made a party to the action; that an order of publication against Browning be made, he being a nonresident of the state. An order of publication was made against Browning. The cause was tried by the court without a jury. The court found for the defendant Chrisman. The finding of the facts fully supported the defence set up. The court, by its decree, vested the title to the lots in controversy in Chrisman, and decreed that Chrisman pay to Browning eight hundred dollars, the balance of the purchase money, with interest. Judgment was rendered against Dickerson and Browning for costs.

White, for appellant.

I. The court erred in not striking out the amended answer of respondent, because he was not entitled to recover on the face of it. More than twelve months had elapsed after bringing suit before Browning was proposed to be brought in as a party. Nearly two years had transpired since respondent had been notified by Browning that he would not deliver him the deed, by which time Browning had gotten out of reach of the process of the court. No demand for the deed was made and no offer by respondent to either pay Browning the purchase money or secure its payment. This proceeding was irregular, and at any rate Browning could only have been made a party by application by petition to the court for that purpose. (See Practice Act of 1849, art. 3, § 10.) The court erred in awarding an order of publication against Browning; no affidavit was filed as the statute requires. (See Practice Act of 1849, art. 5, § 8.) The order of publication was also defective, first, as to the number of weeks the publication was to be made, nor does said order state the fact that the "Boonville Observer" is a newspaper

Dickerson v. Chrisman.

published in this state. (See Practice Act of 1849, art. 5, § 12.) The court erred in going into a trial between appellant and respondent before the expiration of the time set by the court, within which time Browning was required to plead, and in taking proof and trying the cause at a term previous to the term at which final judgment was rendered against Browning. (See Practice Act of 1859, art. 5, § 14.) The court erred in receiving testimony of common report among the associates of appellant to establish title in respondent, common report being wholly inadmissible to establish title to realty, and parol evidence being only admissible to prove possession and not title. (Smith v. Phillips, 25 Mo. 255; Bompart v. Roderman, 24 Mo. 401.) The court erred in not excluding Gildersleeve's deposition, because at the time it was taken Browning was not a party, and at the time it was used he was. The court erred in not giving the instructions asked, and the findings of the court were not warranted by the testimony in the cause. The court erred in decreeing title in respondent; the allegations were not sustained by the proof. The remedy should have been in damages. (1 Johns. Ch. 6; 25 Mo. 162; Phillips v. Thompson, 1 Johns. Ch. 148; Williams v. Robidoux, 11 Mo. 660.) Courts will not decree specific performance of contract unless possession has been given under the contract of sale, and valuable and lasting improvement made in good faith. (White v. Watkins, 23 Mo. 423; Gratiot v. Sigerson, 25 Mo. 63; Bean v. Valle, 2 Mo. 109; Roberts on Frauds, 135; 2 Story's Eq. § 762, 766.) Title could not be decreed to respondent unless entire payment of the purchase money had been made. (Jewett v. Palmer et al., 7 Johns. Ch. 65; Paul v. Fulton, 25 Mo. 162.) The rule is that where both parties claim an equitable title, the one who is prior in time has the better right; but this rule will not apply here. (Boone v. Chiles, 10 Peters, 210.) To make appellant a purchaser with notice, it should have appeared on the trial that he knew when he bought that Browning had conveyed by deed to respondent. (Still v. Paul, 8 Mo. 479.)

Dickerson v. Chrisman.

Douglass and Hayden, for respondent.

I. The case has not been properly saved. The motion for a review is insufficient. The suit was commenced whilst the practice act of 1849 was in force, and it must be governed by that act. (R. C. 1855, p. 1026, § 18; *id.* 1293, § 44.) The motion for review does not set forth the facts to be found differently, nor the evidence bearing on them. (Prac. Act, 1849, art. 15, § 3; *Skinner v. Ellington*, 15 Mo. 488; *Gibony v. Bedford & Kitchen*, 17 Mo. 56; *Raymond v. Edgar*, 19 Mo. 32; *Freeland v. Eldridge*, 19 Mo. 325.) The finding of facts is sufficient. (*Brown v. Emmerson*, 18 Mo. 105; *Conrad & Bennett v. Belt's Adm'r*, 22 Mo. 116.) But if the case had been properly saved, no errors could appear. The judgment against Browning was properly rendered. (R. C. 1855, p. 1279, § 8.) Dickerson was a purchaser with notice of the prior purchase made by Chrisman. He told E. H. Doggett that Chrisman had purchased, and this was before the 12th day of July, 1855, the day of Dickerson's purchase, and this was actual notice. (*Bartlett v. Glasscock*, 4 Mo. 62.) Chrisman was in possession and this was evidence of notice. (*Vaughn v. Tracy*, 22 Mo. 415; 25 Mo. 318.) It was also the common talk and belief in the community, Dickerson's place of business, and among his associates. (*Benoist v. Darby*, 12 Mo. 196; *Brander v. Ferriday*, 16 La. 296.) Dickerson having purchased the property with full knowledge and actual notice of the prior purchase of Chrisman, became a trustee for Chrisman and is bound to convey the legal title to him. (1 Story's Eq. § 395, 396, 397; *Murray v. Ballou*, 1 Johns. Ch. 566; *Murray v. Finnister*, 2 ib. 185; 15 Ves. 350; *Farrar v. Patton*, 20 Mo. 84; *Truesdell v. Callaway*, 6 Mo. 605.) The instructions asked by plaintiff were properly refused. (*Robinson v. Rice*, 20 Mo. 230; *Clouse v. Maguire*, 17 Mo. 158; *Wilburn v. Clark*, 22 Mo. 503.) Browning's declarations and admissions were competent evidence. (*Cavin v. Smith*, 24 Mo. 221.)

Dickerson v. Chrisman.

SCOTT, Judge, delivered the opinion of the court.

We will notice the points, on which a reversal of the judgment of the court below is sought, in the order in which they are presented in the plaintiff or appellant's brief.

There is nothing in the objection that the court erred in not striking out the amended answer of the defendant. The answer contained the facts constituting the defence of the respondent, and it was necessary that they should have been in issue in order to determine the controversy between the parties. It is rather singular that a plaintiff should complain of the delay of a defendant in not disclosing his defence. If he wanted earlier knowledge of it, why did he not bring his suit sooner?

The second complaint made against the judgment below is that the order of publication against Browning was not published in conformity to law, and consequently that he was not properly before the court. This suit having been begun under the practice act of 1849, that act will determine the course of proceeding to be observed in conducting it. We do not see how Dickerson can complain of the manner in which Browning was made a party to the suit. If Browning has been improperly joined, he may make the objection. There is no judgment against him except for costs, nor was any asked. How, then, can the mere naming him as a party in the proceedings affect Dickerson? Browning might complain, but, if he is silent and acquiesces, who shall make objections for him? Dickerson is not damnified by any irregularity in the proceedings against Browning. The judgment against him is just what it would have been had not Browning been named.

Conceding that the evidence of Gildersleeve was in itself admissible, we do not see on what ground the objection to the deposition can be sustained. The point that the absence of the witness was not accounted for was not made until it had been read. As objections to the reading of the deposition were made, and as the objection that the absence of

Dickerson v. Chrisman.

the witness had not been accounted for was not among them, the court was warranted in regarding that objection as waived. There was nothing in the other objections to the deposition, as they were not read as the admissions of a party, but as the declarations of a vendor in possession of real estate affecting those who subsequently claim under him. This subject will be again adverted to.

The propriety of the admission of the evidence in relation to the notoriety of the contract between Browning and Chrisman is fully sustained by authority. Such evidence was clearly competent to prove notice to Dickerson of the contract. (*Benoist v. Darby*, 12 Mo. 206 ; 2 Stark. 191 ; *Muller v. Moss*, 1 Maul. & Sel. 325.) There was however no necessity for such testimony in the cause, as the fact of notice was clearly established by other evidence.

An objection is made to the admission by the court in evidence of the declarations made by Browning before he conveyed to Dickerson that he had sold the property to Chrisman. The fact of a sale to Chrisman was controverted, and these declarations were given in evidence to show a parol sale in order that the defendant might establish his defence and entitle himself to the relief he sought by his answer. The rule seems well established that the declarations of the grantor, bargainor or vendor of real estate, such declarations being made at any time before the act of granting, bargaining or vending, are admissible against the immediate grantee, bargainee or vendee, and all who claim more remotely under the same title. (*Cowen & Hill's Notes*, 652.) The case of *Davis v. Spooner*, 3 Pick. 284, is thus stated in the book just referred to : "In a writ of entry for White Farm, both parties claimed under a deed from S., the deed by which the demandant claimed being oldest but not recorded. The defendant, however, purchased with actual notice of the first deed. This being shown, and that the grantor had fraudulently obtained and suppressed the first deed—held, that his declarations were admissible to prove its existence and contents, as coming from one under whom the defendant claim-

Dickerson v. Chrisman.

ed." In its main features this case is almost parallel with that now under consideration.

The most important question in this case is, whether there was such a contract between Chrisman and Browning as can be specifically enforced, although not reduced to writing. The deed executed by Browning for Chrisman must be laid out of the case, as it does not appear to have been delivered. The want of a delivery rendered it ineffectual for any purpose. There is not any difficulty in the way of enforcing the contract against Dickerson, as the court finds the fact that he had actual notice of the contract, and the evidence fully warrants the finding. The acts that shall be deemed such a part performance of a parol contract for the sale of lands as will take it out of the operation of the statute of frauds are not well defined, and the cases show much contrariety of opinion on the subject. Judge Story says: "A more general ground, and that which ought to be the governing rule in cases of this sort is, that nothing is to be considered as a part performance which does not put the party in a situation, which is a fraud upon him unless the agreement is fully performed. Thus, for instance: if, upon a parol agreement, a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser, if there be no agreement valid in law or equity. Now, for the purpose of defending himself against a charge as a trespasser, and a suit to account for the profits in such a case, the evidence of a parol agreement would seem to be admissible for his protection, and if admissible for such a purpose, there seems no reason why it should not be admissible throughout." (Story's Eq. § 761.) The instance stated as an application of the rule is so extremely similar to the circumstances of the case before us that we are relieved from the necessity of seeking further illustrations. If the statute in this instance should interpose an obstacle to the relief sought by the defendant, it would furnish a protection to a great fraud. The defendant was let into possession under a contract on which he had paid a large portion of the purchase money, and is now exposed to

Dickerson v. Chrisman.

an action of ejectment and is forced to defend himself against an account for the mean profits. The house he contracted for was used and intended for a hotel, and with it he purchased the furniture. So he is subjected not only to an action of ejectment, to an account for rents, but a quantity of useless furniture is left on his hands. If the principle above stated has any force, it must reach a case of this kind. If it is true that a statute designed to prevent frauds shall not be made a means of protecting them, the plaintiff must fail in this suit.

This being a trial by the court, there was no necessity for instructions. The practice act of 1849, under which the action was begun, did not require them.

The rule, that a judgment is an entire thing and if reversed as to one must be reversed as to all, is one only applicable to judgments in courts of common law jurisdiction; or, in other words, to judgments at law. The answer of the defendant converted this proceeding, in effect, into a suit in the nature of proceedings in equity. The eighth section of the thirtieth article of the act of 1849 prescribed the mode by which a party against whom a judgment by publication was obtained might be relieved. Dickerson has no right to appear in this court and seek a reversal of the judgment against Browning when he is not affected by it. This court will not suffer one who is beyond its jurisdiction to make objections to the proceedings of our courts, unless he will come in and enter his appearance and thereby place himself in a situation that a personal judgment can be rendered against him. If he is aggrieved, he can only obtain redress in the manner pointed out by the statute. Dickerson can not complain, if he was liable to a judgment for costs, that the judgment was jointly rendered against him and another. That the judgment was rendered against another together with himself does not injure him.

Affirmed; Judge Richardson concurs. Judge Napton absent.

Kennett v. Plummer.

KENNETT *et al.*, Appellants, v. PLUMMER *et al.*, Respondents.

1. Whatever may be the nature of the title acquired by the state of Missouri by virtue of the act of Congress of June 10, 1852, granting lands in aid of the construction of certain railroads—whether the state acquired the fee simple title to the lands clothed with a political trust for the execution of which the faith of the state was pledged by the acceptance of the grant, or whether the act of Congress created an estate upon condition subsequent—a mere trespasser can not defend against a grantee of the estate by invoking a supposed right of the United States to enter for condition broken.
2. Until entry by a mortgagee for condition broken, or until foreclosure, the mortgagor is the owner of the mortgaged estate and may lease the same, or otherwise deal with it as owner.

Appeal from Newton Circuit Court.

This was an action, under the act to prevent certain trespasses (R. C. 1855, p. 1552), to recover damages for an alleged carrying away by defendants of a large amount of lead ore from the land of plaintiffs. The land upon which the alleged trespasses were committed is section six, township twenty-five, range thirty west, situate in Newton county. Plaintiffs claim said land by virtue of a lease from the Pacific Railroad, dated June 11, 1857, for a term of ten years. The petition sets forth the title of the plaintiffs as follows: 1st, act of Congress of June 10, 1852, entitled "An act granting the right of way to the state of Missouri, and a portion of the public lands, to aid in the construction of certain railroads in said state;" 2d, an act of the general assembly of the state of Missouri, approved December 25, 1852, entitled "An act to accept a grant of land made to the state of Missouri by the Congress of the United States to aid in the construction of certain railroads in this state and to apply a portion thereof to the Pacific Railroad," (Sess. Acts, 1853, p. 10); 3d, an act of Congress of August 3, 1854, entitled "An act to vest in the several states and territories the title in fee simple of the lands which have been or may be certified to them;" 4th, the approved list of the commissioner of the General Land office; 5th, the lease above mentioned from

Kennett v. Plummer.

the Pacific Railroad to plaintiffs. Plaintiffs also alleged the due incorporation of Pacific Railroad; that the requirements of the laws in regard to survey, location of road, selection of lands, &c., had been complied with; also, that under the act of December 10, 1855 (Sess. Acts, 1855, Adj. Sess. p. 472), a mortgage had been executed by plaintiffs to the treasurer of the state of Missouri, embracing the land upon which the trespass was committed.

The defendants demurred to this petition. The court sustained the demurrer.

Stevenson, for appellants.

I. Appellants were the legal owners of the land by virtue of their lease, and as such had a right to sue respondents for the trespass complained of. The title of the Pacific Railroad is the title of the appellants, and under that title the Pacific Railroad had a clear right of action. (Tuck. Com. 86, 88; Lomax Dig. 332.) A less estate than a fee simple known as a qualified fee carries with it, until the estate is defeated, the same rights and privileges over the estate as if it were a fee simple. (Lomax Dig. 23.) Until the consideration is broken the estate is an estate of freehold. (Tuck. Comm. 89.) If there was any doubt about the title of the railroad to the lands in controversy, the act of Congress of August 3d, 1854, confirms in the state a fee simple. The state having granted the lands to the Pacific Railroad on the conditions contained in the act of Congress, the act of August 3, 1854, enured to the benefit of Pacific Railroad, the donation by the state to the Pacific Railroad being alone hampered by the original restrictions imposed by Congress. No one but the donor and the privies of the donor can take advantage of a defeasance of the estate; and whether the estate is conditional or not, it is not to be taken advantage of by defendants. (Tuck. Comm. 88, 90; Lomax's Dig. 333, 363 & 364; 4 Kent, Comm. 131.) The statutory trespass is given to the *owner* of the land, and it is not essential to aver or prove any thing beyond the ownership of the land. The

Kennett v. Plummer.

acts of Congress and the legislature of Missouri only direct the manner in which the lands may be sold, and in nowise limit the rights of the Pacific Railroad to the land granted so as in anywise to debar the Pacific Railroad from all rights incident to the estate granted. The execution of the mortgage does not divest the mortgagor of his ownership of the property until after forfeiture and foreclosure. (1 Hilliard on Mort. 137-9.) A mortgagor may make a lease and it is good against all the world but the mortgagee. (Lomax Dig. p. 432; Tuck. Com. 107.) The intestate of a mortgagee is only in the nature of a security; the mortgagor is the true owner. (Lomax Dig. 432; Tuck. Com. 97, 98; Hilliard on Mortg. 140, § 12.) A mortgagor or his assignee can not be treated as a trespasser by the mortgagee; much more then is a stranger not to impeach his right. (Lomax Dig. 431, 432; Tuck. Com. 107.) A mortgagor can sell, lease and encumber the mortgaged estate at any time before forfeiture and foreclosure. The only effect of the mortgage is that it is an incumbrance, and the title conveyed is a complete investiture on the grantee, lessee, &c., subject to the mortgage debt. (Lomax Dig. 431; Tuck. Com. 107.)

Hendrick and Carter, for respondent.

I. The lease of Blow & Kennett was not only unauthorized but in violation of the terms of the grant, and conferred no right upon Blow & Kennett whatever, especially as the object and purpose of the lease were to commit an authorized trespass to the prejudice of the reversionary interest of the United States. The lease is void because for a longer time than the Pacific Railroad was given to complete said road by act of Congress of June 10, 1852. (Kennedy & Moreland v. The heirs of McCarteny, 4 Porter, 141.) The petition does not state facts sufficient to constitute a cause of action, because it shows no right, title or interest of plaintiffs to the land; nor does it show that plaintiff ever had possession of the land or any right to the possession thereof; nor does it show that the mineral was the property of plaintiffs, or that

Kennett v. Plummer.

it was dug up out of the land in question since the date of the lease. It does not appear that the mineral was not taken up out of the land long before the date of the lease. Nothing appears in the petition to show that the mineral was dug out of the land in question by defendants, or that plaintiffs had any interest in the mineral or possession of it.

RICHARDSON, Judge, delivered the opinion of the court.

The main objection taken to the plaintiffs' right of recovery is, that the lease under which they claim is void ; first, because it is in violation of the condition on which the grant of the lands was made by Congress ; and, secondly, because the mortgage to the treasurer of the state, which had been previously executed by the lessor, was still outstanding. Whatever title the state of Missouri acquired by the act of Congress of the 10th of June, 1852, was vested in the Pacific Railroad by the act of the general assembly approved December 25, 1852 ; and whether the state acquired the fee simple title to the lands, clothed with a trust for the execution of which the public faith was pledged by accepting the grant, or whether the act of Congress granted an estate upon conditions subsequent, is immaterial to the decision of this case. Whenever the United States interpose for the purpose of having a trust executed, or enter for a broken condition, it will be time then to determine the legal character and conditions of the grant ; but a mere trespasser can not protect himself under any right which the United States might assert ; (*Cooper v. Roberts*, 18 How. 181 ;) and, as conditions are only reserved for the benefit of the grantor, a stranger can not take advantage of the breach of them. (4 Kent, 127.)

The modern doctrine is well established that a mortgage is but a security for the payment of the debt or the discharge of the engagement for which it was originally given, and until the mortgagee enters for breach of the condition, and in many respects until final foreclosure of the mortgage, the

Kennett v. Plummer.

mortgagor continues the owner of the estate, and has a right to lease, sell, and in every respect to deal with the mortgaged premises as owner, so long as he is permitted to remain in possession. (4 Kent, 157.) Of course he can not impair the rights of the mortgagee, and every person taking under him will hold subject to the mortgage and to all the rights of the mortgagee. It does not appear that the mortgagee has ever objected to the lease as interfering with his rights or as impairing the security the mortgage was intended to give, or that there has been any forfeiture of the conditions; and a stranger surely should not be permitted to volunteer such objections, which are strictly technical, to avoid liability for unauthorized trespasses.

The demurrer was improperly sustained, and the judgment will be reversed and the cause remand; Judge Scott concurring. Judge Napton absent.

[END OF JANUARY TERM.]

CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI,
MARCH TERM, 1859, AT ST. LOUIS.

BREWSTER, Respondent, v. LINK, Appellant.

1. In actions founded on the "act to prevent certain trespasses," (R. C. 1845, p. 1068,) the jury can assess single damages only; the jury should assess the value of the property taken or injured; the court will then, if a proper case be made out, give judgment for treble the amount so assessed.
2. The question of "probable cause" is in such cases to be determined by the court.
3. Where the petition contains counts under the statute and at common law, and the jury render a general verdict, the court is not authorized to treble the damages.

Appeal from St. Louis Land Court.

T. Polk, for appellant.

I. The jury could only assess single damages. When damages are to be trebled, it must be done by the court, not by the jury. (1 Cow. 584, 160; 8 Johns. 344; 4 Mo. 564; 7 Mo. 149; 8 Mo. 350; 12 Mo. 511; 1 Mo. 280.) The fourth instruction authorizes the jury to assess treble damages against the defendant. This was error; nor is it any the

less error that the defendant prayed a similar instruction, which was also given by the court. The court having given the fourth instruction against the objection of the defendant, he might well ask an instruction putting the same erroneous legal proposition in a shape less prejudicial to his case. The instruction is erroneous for other reasons. The damages were flagrantly excessive.

Bland & Coleman, for respondent.

I. The defendant can not successfully complain of the instruction given on the prayer of the plaintiff. The defendant asked and the court gave an instruction asserting the same proposition asserted in the instruction alleged to be erroneous. The defendant can not allege as error that which was done at his own request and by his own instructions.

II. There is nothing in the record to show that the jury gave a verdict for any thing more than single damages. (*George v. Rook*, 4 Mo. 149.) The verdict is that the jury "find for the plaintiff and assess his damages at the sum of \$100." (17 Mo. 465; *Labeaume v. Woolfolk*, 18 Mo. 514; 24 Mo. 492; 26 Mo. 143.)

RICHARDSON, Judge, delivered the opinion of the court.

This was an action of trespass alleged to have been committed by the defendant on land that belonged to the plaintiff. The petition contains three counts—two of which were intended to be framed on the statute of 1845 to prevent trespasses, and the other is a common law count for entering the plaintiff's close and cutting and carrying away timber, and removing wood and rails. The jury found a general verdict for the plaintiff and assessed his damages at one hundred dollars. The court gave the following instruction at the plaintiff's instance: "If the jury shall believe from the evidence in the case that the fence in question was erected by the plaintiff, and that at the time of the erection thereof he was in the possession of the land upon which it was erected,

Brewster v. Link.

and had been in such possession for a period of years prior thereto, and that the defendant removed the fence, and that such fence was not upon the land of the defendant, then the defendant is entitled to treble the amount of damages sustained in consequence of such removal, unless the jury shall believe that the defendant had probable cause to believe that the land on which the fence stood was his own."

The practice is well established that in actions founded on the statute, entitled "An act to prevent certain trespasses," the jury can only assess single damages; and that when a proper case is made out for trebling the damages, it can only be done by the court; (*Lowe & Forsythe, v. Harrison*, 8 Mo. 350; *Walther v. Warner*, 26 Mo. 148;) and the court is not authorized to treble the damages assessed by the jury in a general verdict, in a case where the petition contains counts under the statute and at common law; (*Lowe & Forsythe v. Harrison*, 8 Mo. 350;) or the petition goes for a wrongful entry *and* other damages, and the verdict omits to find the value of the thing injured, destroyed or carried away. (*Ewing v. Leaton*, 17 Mo. 465; *Labeaume v. Woolfolk*, 18 Mo. 514; *Herron v. Hornback*, 24 Mo. 492.) The plaintiff does not defend the instruction, but contends that it did not prejudice the defendant, as there is nothing in the record to show that the jury gave any thing more than single damages. As the jury can lawfully only assess single damages, it will generally be presumed that they gave nothing more, (*Cooper v. Martin*, 6 Mo. 634,) but this presumption will not be indulged when the jury is expressly told by the court that they may give treble the amount of damages sustained by the plaintiff.

After the instructions asked by the plaintiff had been given against the defendant's objections, he asked the court to instruct the jury to the effect that the plaintiff could not recover in any event more than single damages, if they should find that the defendant had probable cause to believe that the land on which the trespass was alleged to have been committed, or the things injured or destroyed, taken or carried

Bradley v. Holloway.

therefrom, were his own. It is insisted that as the defendant, in the instruction which he asked and the court gave, conceded that it was the province of the jury, in a given state of facts, to treble the damages, that he can not now complain of the instruction given at the plaintiff's instance. If the defendant had asked the same declaration of law contained in the plaintiff's instruction, and no more, it might be insisted that he had waived his objection to that instruction; but as he was compelled to take the law as the court chose to give it, he did not lose the right to insist on his exceptions in this court by seeking to break the force of an erroneous proposition in a form less hurtful to his case.

The other judges concurring, the judgment will be reversed and the cause remanded.

BRADLEY, Appellant, v. HOLLOWAY, Respondent.

1. Where, in St. Louis county, a levy of an execution or attachment is made upon personal property, a person other than the defendant in such execution or attachment, claiming the property so levied on, has a choice of remedies. He may make claim to the property in accordance with the third section of the local act of March 3, 1855, (Sess. Acts, 1855, p. 464); in which case, if the sheriff or other officer demands and receives a *sufficient* indemnification bond from the plaintiff in the execution or attachment, the claimant will have no remedy against the officer but must resort to a suit on the indemnification bond. Should the claimant, however, not make claim in the manner provided in said section, he may maintain an action against the sheriff or other officer for the possession of the property levied on.
2. A sheriff or other officer levying an execution or attachment is not authorized, under said act of March 3, 1855, to demand an indemnification bond of the plaintiff in the execution or attachment unless claim is made to the property levied on substantially as provided in the third section of said act.

Appeal from St. Louis Law Commissioner's Court.

Dedman, for appellant.

I. The act of March 3, 1855, is merely cumulative in its provisions and not obligatory. Parties claiming personal

Bradley v. Holloway.

property seized under execution or attachment are not obliged to enforce their claims under it.

Bay, for respondent.

I. Bradley omitted to set forth his claim in writing as required by the third section of the act of March 3, 1855.

RICHARDSON, Judge, delivered the opinion of the court.

The plaintiff brought an action of replevin against the defendant for a wagon and yoke of oxen. The cause was tried without a jury; and it appears, from the facts found by the court, that the defendant, as constable of Merrimac township, levied on the property in dispute whilst in the plaintiff's possession, by virtue of an execution issued by a justice of the peace of that township against Benjamin Haley. The court further found that the property did not at any time belong to Haley, but that it belonged to the plaintiff, which he demanded of the defendant before the commencement of the suit, though not in the manner indicated by the third section of the act entitled "An act concerning the duties of sheriff and marshal in the county of St. Louis in relation to the levy and sale of such property under execution or attachment as may be claimed by third persons," approved March 8, 1855. (Sess. Acts, 1855, p. 464.) On these facts judgment was rendered for the defendant, and the plaintiff was ordered to return the property or pay one hundred dollars, the assessed value thereof, at the election of the defendant.

The only question in the case arises on the construction of the local act referred to. The obvious purpose of the act was to relieve to some extent the ministerial officers named in it from the embarrassing duty of ascertaining at their peril, in all cases, whether property levied on by them belongs to the defendant in the writ or not. By the common law, the sheriff is bound, when he receives an execution, to make reasonable inquiry to ascertain if the defendant has any property in his county subject to levy, and if he finds the

defendant in the possession of any, whether it is claimed by a third person or not, he will be liable to the plaintiff in an action for a false return if he fails to levy, and the burden of proof will fall on him to show that such property was not in fact subject to the execution. If, on the other hand, he makes a levy, and the goods do not belong to the defendant, he is liable to the owner in an action of trespass. Though the owner may assert his title in the most solemn form, and exhibit the proof of it to the officer, the latter can not require indemnity from the plaintiff, who may fold his arms and say to the sheriff, do your duty at your peril; and in this dilemma, liable on one hand to an action for a false return, and on the other to an action of trespass, the sheriff must judge for himself both the law and the facts.

The statute under consideration relieves the office of sheriff of some of its responsibility, and provides that when personal property is seized by virtue of an execution or attachment, which is claimed by any person other than the defendant in such execution or attachment, and the claimant shall set forth his claim in its particulars, verified by affidavit as prescribed by the third section, the officer may release his levy and refuse to execute the writ, unless the plaintiff gives a bond of indemnity with sufficient security conditioned as directed by the second section. The sheriff has no right to surrender property levied on, or to require a bond from the plaintiff, on the mere claim of a stranger; but when the particulars of the claim are stated and sworn to, the officer may say to the plaintiff that a claim has been made to the property by a third person in a manner that entitles it to respect, and that he will refuse to execute the writ unless a bond is given as provided by law. As the plaintiff is not required to give a bond unless a claim is made substantially in a certain manner, neither is the owner compelled to prefer his claim in the mode indicated by the third section; but if he does, by that act alone he makes his election to give up any right of action against the sheriff, and to seek his remedy on the bond. If a bond is not given after a claim

Bradley v. Holloway.

is properly made, the officer may release his levy; but if a sufficient bond is taken, the officer is no longer liable, and the bond is interposed between him and the claimant. In our opinion, this is the spirit and object of the act; and whilst this construction gives the act some practical and useful effect, it restrains it from working the gross injustice and mischief which would result from the view taken by the law commissioner.

By the first section it is declared that when any sheriff, &c., shall levy on any personal property, and any person other than the defendant in the writ shall claim the same, the officer shall demand a bond of indemnity of the plaintiff and may refuse to execute the writ until such bond be given. The officer can not release his levy or require a bond unless the property is claimed, and the third section defines the kind of claim meant by the first section. It says, "no claim made to any personal property levied on as aforesaid shall be valid or lawful as against such officer, unless such claimant or his agent shall set forth his claim in writing," &c. The claim here spoken of refers to the claim mentioned in the first section, and the third section may be read thus: "No *such* claim made to any personal property levied on as aforesaid shall be valid or lawful as against said officer," that is, shall be lawful or sufficient to authorize the officer to release his levy, or to require a bond of the plaintiff, "unless the claimant shall set forth his claim in writing, verified by the affidavit," &c.

It is contended that the officer is not liable in any case unless the claimant shall set forth his claim as directed by the third section, and that, even though the claim is made in that mode, no action can be maintained against him if he takes a sufficient bond from the plaintiff; so that, no matter where the property is seized or sold, or how the claim is made, or whether made at all, the officer is not liable. Such a construction would deny any redress to a person whose property may be levied on and sold without his knowledge to pay another's debt, and would compel the owner of a family

picture, or other property more prized than money, to see it sold and delivered to a stranger and then to take the chances of recovering it, or its money value a jury may set upon it. We can not believe that the legislature, out of tenderness to officers, whose fees compensate them for the risks they take, intended to sanction such a sacrifice of the rights of other persons. If the claimant is willing to accept the value of his property in damages, and to discharge the sheriff from liability, he may present his claim in a manner which will justify the officer in abandoning his levy, unless a sufficient bond is executed by the plaintiff; and when a bond is thus given at his instance, he thereby releases the sheriff and must look to the purchaser or the plaintiff and his sureties on the bond. But we think that the act does not apply to a person who makes no claim whatever, and that there is no legal difference between making no claim and making a claim not in conformity to the statute.

This case illustrates the injustice that would be inflicted by yielding to the construction contended for by the defendant. The court found that the property in controversy belonged to the plaintiff; that the defendant in the execution had no interest in it, but that the plaintiff could not recover, and must return his own property to the constable or pay one hundred dollars at the election of the defendant, because, though he had demanded his property, he had omitted to do it in the set words of the statute. When the money is paid to the defendant, he may apply it to the execution, and the owner of the property unjustly taken to pay another's debt will have no cause of action, except against the plaintiff who may have directed the trespass, and that remedy will be fruitless if the party is insolvent. Such a penalty ought not to be imposed unless the plain language of the law demands it.

On the facts found the plaintiff was entitled to recover, and the judgment of the law commissioner will be reversed and a judgment entered in this court in favor of the plaintiff; Judge Napton concurring.

Bradley v. Holloway.

SCOTT, Judge, dissenting. We must suppose the act of March 3d, 1855, entitled "An act concerning the duties of sheriff and marshal in the county of St. Louis, in relation to the levy and sale of such property under execution or attachment as may be claimed by third persons," (Sess. Acts, 1855, p. 464,) was intended for some purpose. With the policy or impolicy of the law we have nothing to do. When the will of the legislature is clearly expressed by a constitutional law, we have but to carry that will into execution. The constitution never designed that the judiciary should sit in judgment upon the wisdom or policy of the acts of the legislative department. It is clear from the terms of the act that it had for its object the protection of the officers therein named from the claims of persons asserting a right to goods taken by virtue of legal process. As the law was designed to protect the officers against the claimants of property seized under process, it could never have contemplated, that, whether the officer should be protected or not would be entirely at the discretion of a claimant. We must not suppose that the general assembly, whilst intending to protect an officer against the claim of a person interfering with the execution of the process of the law, provided that whether the officer should be protected or not would depend entirely on the will of the person interfering with him. Under the construction given, if the claimant makes a demand for the property in a way altogether irregular, or does not make it at all, he will have his action against the officer, thus making a law that was intended to protect one against another extend the protection only at the will of him against whose acts the protection was designed.

The action of replevin is not adapted to this end. If property may be replevied while in the sheriff's hands, then such replevy will be a valid return to the writ. Who then is to defend the action of replevin prosecuted against the sheriff? Shall he at his own costs be required to employ counsel and defend the action for the benefit of the plaintiff in the execution? In some cases the plaintiff may do this;

in others he will not, and thus, by a hardy act on the part of a bold claimant, the claims of creditors may be defeated. With the construction given the act, it would have been a great deal better if it had never been passed. As to the protection from sale of things enhanced in value to the owner by the *pretium affectionis*, our law has always afforded a means by which an officer could be enjoined and restrained from the sale of such articles without the aid of a writ of replevin.

In my opinion, if the claimant of property has notice of the seizure of it by the officer, and fails to make his claim to it in the manner pointed out by the act, his recourse against the officer is gone, and he is confined to bring his action against the plaintiff in the execution when he has made himself liable, or to the purchaser of the property at the sale made by the officer; and there is not the least hardship in this, as by complying with the directions of the law the claimant might have had ample security for the property claimed by him. In my opinion, the judgment should be affirmed.



STILLWELL, Defendant in Error, v. TEMPLE, Plaintiff in Error.

1. Relief against penalties will not be afforded at the instance of the persons in whose behalf the penalties are stipulated for.
2. A. leased a dwelling-house to B. for one year. A. stipulated in the contract of lease that he would at any time during the year sell and convey the premises to B. on certain specified terms. B. covenanted that he would during the term demand a conveyance and comply with the conditions of sale. It was further agreed as follows: "Upon the completion of said sale and purchase as and in the manner aforesaid, said lease and rent shall cease; and to secure the faithful payment of said rent and making of said purchase as and in the manner aforesaid, the said B., has assigned unto said A. his right and title to three hundred shares of the capital stock of the St. L. & B. Mining Company, now owned by him, which shall become the absolute property of said A. without redemption, and as and for liquidated damages and not as a penalty, in case said B. should fail faithfully to pay said

Stillwell v. Temple.

rent and make said purchase when and in the manner aforesaid; but upon such faithful performance the stock shall revert and be reassigned to him." B. failed to pay the rent or to make the purchase as agreed. A. brought suit against B. to recover one year's rent of the premises and damages for the failure of B. to purchase the premises; he did not offer to return the stock mentioned in the contract or to give credit for its value. *Held*, that A. was not entitled to recover; that the stipulation with respect to stock, whether regarded as a penalty or as stipulated damages, was a bar to such recovery.

Error to St. Louis Land Court.

The court, at the instance of the plaintiff, gave the following instructions to the jury: "1. If the defendant executed the lease and agreement read in evidence, and if the defendant failed to purchase the premises described in said agreement according to the terms and conditions thereof, then the plaintiff is entitled to recover for one year's rent of said premises according to the price of said rent named in said lease, and in addition thereto such damages as the jury shall believe the plaintiff has sustained by reason of the defendant's failure to purchase said premises in conformity with the terms of said agreement. 2. The measure of damages for the failure on the part of defendant to purchase the property described in the lease and agreement read in evidence is the actual damage the plaintiff has sustained by reason of such failure."

The court refused the following instructions asked by the defendant: "If the jury believe from the evidence that, at the time of the execution of the agreement sued on, the defendant assigned to plaintiff defendant's right, title and interest in three hundred shares of the capital stock of the St. Louis & Birmingham Iron Mining Company, and that it was then agreed that said stock so assigned should become the absolute property of plaintiff without redemption, and as for liquidated damages and not as a penalty in case defendant should fail to pay the rent and make the purchase as provided in said agreement; and if they further believe from the evidence that the defendant paid the rent for the first year, and that by agreement between the parties the terms of the

original agreement were continued in force for one year longer, to-wit, until April, 1855, and the plaintiff continued to hold said stock upon the terms provided in said original agreement as thus extended, they must find for the defendant, unless they further believe from the evidence that plaintiff, before the commencement of this suit, reassigned said stock to defendant, or offered so to do, and that defendant refused to receive the same. 2. They are further instructed that the law will not permit plaintiff to retain and hold the stock described in said agreement as a penalty or forfeiture, and also to recover in this suit for the breaches of the covenants in said agreement."

The defendant offered to prove that the stock spoken of in the agreement "was of the par value of fifty dollars per share." The court, on the motion of plaintiff, refused to permit the testimony to be introduced.

Hill, Glover & Hill, for plaintiff in error.

I. The court erred in excluding evidence as to the par value of the stock.

II. The court erred in giving the instructions asked for by plaintiff and in refusing those asked for by defendant. The language of the agreement is too strong to leave the least doubt of the intention of the parties to liquidate the damages.

Krum & Harding, for defendant in error.

I. The testimony offered to prove the par value of the stock was properly excluded. The value of the stock was not an issue in the case; and if the plaintiff was not entitled to hold the stock, no foundation was laid by the answer or the evidence to charge him with its value by way of set-off or otherwise. But the plaintiff, by the terms of the agreement, had a right to hold the stock.

II. The proposition embodied in the refused instructions of the defendant is not law. It is tantamount to saying as matter of law that the plaintiff had no right to claim either rent or damages of the defendant, notwithstanding his covenants.

Stillwell v. Temple.

It is manifest that this is not according to either the letter or spirit of the agreement. Reassigning the stock would make no difference in this result, unless such reassignment was by agreement of the parties to be a cancellation of that part of the agreement which relates to the stock. The rent was definitely fixed by the agreement. The agreement with respect to the stock relates to the damages in case of a failure to purchase. If this clause is to have any effect, it must be construed as a penalty. (See 5 Sandf. 192; 18 Barb. 336; 9 Jones, N. C., 15; 11 Texas, 273.) The transfer of the stock was merely by way of security. The damages not liquidated. No sum was fixed. Assuming the par value of the stock as fixed, it must be regarded as a penalty. Suppose the defendant had performed his covenant to purchase but had failed to pay rent; would it be said that the rent was paid by the transfer of the stock? The case does not come within the rules which govern questions of liquidated damages.

RICHARDSON, Judge, delivered the opinion of the court.

The parties to this action entered into a written contract by which the plaintiff agreed to lease to the defendant for the term of one year a dwelling-house in the city of St. Louis, and the defendant agreed to pay therefor, in monthly instalments, seven hundred and thirty-five dollars. By the same instrument, which was under seal, the plaintiff stipulated that he would at any time during the year sell and convey the premises to the defendant at the price and on the terms therein particularly set forth, and the defendant covenanted that he would during the term demand a conveyance and comply with the conditions of the sale. It was further agreed "that upon the completion of said sale and purchase as and in the manner aforesaid, said lease and rent shall cease; and, to secure the faithful payment of said rent and making of said purchase as and in the manner aforesaid, the said Temple has assigned unto said Stillwell his right and title to three hundred shares of the capital stock of the St.

Louis & Birmingham Mining Company now owned by him, which shall become the absolute property of said Stillwell without redemption, and as and for liquidated damages and not as penalty, in case said Temple should fail faithfully to pay said rent and make said purchase when and in the manner aforesaid; but upon such faithful performance the stock shall revert and be reassigned to him." At the end of the year, the contract in all its provisions was renewed and extended for another year. The defendant paid the rent for the first year, but paid nothing for the second year, and did not complete the purchase of the property, though the plaintiff was ready and willing and offered to perform the agreement on his part. Without offering to return the stock mentioned in the contract or to give credit for its value, the plaintiff brought an action on the defendant's broken covenants, in which he sought to recover one year's rent and damages for the failure of the defendant to purchase the premises. After the commencement of the suit, but before the trial, the plaintiff sold the property, and it will be observed that the petition does not ask to have the contract of purchase specifically enforced, which the plaintiff had rendered impossible, but the action sounds entirely in damages.

The defendant contends that the parties to the contract mutually agreed that in the event of a breach of its provisions, the stock assigned and delivered to the plaintiff should cover the damages, which might be incurred, as liquidated or settled damages, without reference to the actual injury sustained. The plaintiff, on the other hand, insists that the stock or its value should be considered only as penalty, which was intended as a security for the actual damages that might accrue by the failure of the defendant to perform his contract.

The courts have indicated a strong inclination towards that construction which excludes the idea of liquidated damages and which limits a recovery to compensation for the real injury; but the rule is almost invariably invoked in favor of the party who is bound for the penalty, and it is seldom that

Stillwell v. Temple.

a party who has exacted a penalty is heard to ask to be relieved from it. If the defendant was here seeking to be relieved of a forfeiture, and to redeem the stock on condition of paying the damages which the plaintiff had suffered by a breach of his covenants, it would become material to determine whether the stock should be treated as liquidated damages or as a penalty. But that question, in our opinion, is immaterial to the decision of this case, for, no matter how it might be determined, the plaintiff is not entitled to recover. If the parties at the time of making their agreement, in order to avoid any future dispute as to the amount of damages which might result from a violation of the contract, agreed upon a definite sum represented by the stock, the plaintiff must look to the stock, as he had agreed to do, as a complete and adjusted indemnity; and if, on the contrary, the construction contended for by the plaintiff is maintained, and it is held that the stipulated amount is to be regarded as a penalty, then it is not perceived on what principle he can ask to be relieved from a penalty he exacted himself, and be permitted to recover beyond the amount of it. Suppose that, instead of the stock of the mining company, bank stock worth a premium had been deposited to cover the breaches in advance, or rather that fifteen hundred dollars in money had been given to the plaintiff, with the express agreement that he should keep it as his own and as a full compensation for any damage he might suffer by the failure of the defendant to comply with the agreement; would it be contended that he had a right to hold on to the money and recover what he could besides? Could he be heard to complain that he was not fully compensated? In the case supposed the deposit would be regarded as the maximum of the defendant's liability, and though he might be relieved from a forfeiture of the whole sum on paying the actual damages occasioned by his default, the plaintiff would demand nothing beyond it. The defendant might insist that he should not lose all without reference to the extent of the injury the party had sustained; but as a penalty is generally fixed at a sum large enough to

Adams v. Darby & Barksdale.

cover any probable liability that may be incurred, the plaintiff would not be allowed to recover beyond it. There can be no reason, if a person proposes to make a purchase at a future day, why he can not deposit stock, or any other property, with the stipulation that in the event of being disappointed in procuring means to complete a purchase, he shall only forfeit the deposit. He may be willing to lose that much for the chance of making a bargain, but unwilling or afraid to run the risk of being ruined if he should fail to comply with the terms of a sale.

The plaintiff insists that the clause of the contract under consideration relates only to the damages that might be incurred by the failure of the defendant to purchase the property. As any arrears of rent could easily be computed, there was little reason for securing it by a penalty, or liquidating the damages that might result from the nonpayment of it; but the parties chose to contract otherwise, and on turning to the clause, it will be seen that the obligation to pay rent is indissolubly connected with the agreement to purchase; and the plaintiff's construction can not be maintained without doing violence to his language and wresting words from their context.

Judge Scott concurring, the judgment will be reversed.

ADAMS, Respondent, v. DARBY & BARKSDALE, Appellants.

1. It will be presumed that the drawer of a bill of exchange has a right to draw on the drawee thereof until the contrary be shown; if the payee or holder seeks to recover of the drawer in a case where no presentment has been made, it will devolve on him to show that the drawer had no funds in the hands of the drawee and no right to draw on him; it will not be sufficient to show that the drawer withdrew his funds after the maturity of the bill.
2. Whenever it is incumbent upon the holder of a bill to make presentment thereof, and he neglects to do so, he will lose not only his remedy upon the bill, but also upon the consideration or debt in respect of which it was given or transferred.

Adams v. Darby & Barksdale.

Appeal from St. Louis Circuit Court.

Knox & Kellogg, for appellants.

I. Where a party has received money which in equity and good conscience he has no right to retain, he is liable, in an action for money had and received, to the person to whom in justice and conscience the money belongs. (7 Mass. 288; 10 S. & R. 219; 6 S. & R. 369; 1 Dall. 148; 2 Dall. 154; 1 Harr. & Gill, 258; 13 Wend. 488; 2 Denio, 91.) The bill of exchange was payable out of the proceeds of the castor oil. The defendant received the proceeds of the oil. By drawing the bill, he had agreed with him who might be the holder of the bill at maturity that the same should be paid out of the proceeds of the oil. The proceeds were received by plaintiff. It is quite immaterial whether the bill of exchange was presented or not. Respondent could have sustained no damage in consequence of the failure to present. The plaintiff withdrew all property in the hands of the drawee. He retains \$925, to which, in common honesty, the defendants are entitled.

Bland & Coleman, for respondent.

I. Plaintiff was not liable upon the bill. The failure to present discharged the drawer. (Chitty on Bills, 385; Byles on Bills, 169.) The want of presentment was not excused. (See Chitty on Bills, 389; Byles, 171, 230, 231.) The plaintiff was not liable for money had and received. The bill of exchange did not operate as an assignment of the proceeds of the sale of the oil. It was a bill of exchange, not an order to pay over the proceeds. (See Kimball v. McDonald, 20 Mo. 577; Luf v. Hope, 5 Hill, 413; Byles on Bills, 74.)

RICHARDSON, Judge, delivered the opinion of the court.

It is averred in the petition that on the 4th of September, 1856, the plaintiff deposited with the defendants, who are bankers, \$2,296, under the agreement that he could withdraw the same at his pleasure; that he drew checks against the

Adams v. Darby & Barksdale.

deposit, prior to the 18th of October, to the amount of \$1,635, leaving a balance of about \$660; and that afterwards, on the 17th of December, he drew a check for said balance which the defendants refused to pay. The defendants in their amended answer did not deny any of the allegations in the petition, but set up as a counter claim that the plaintiff, on the 15th of April, 1856, drew a bill of exchange on Oglesby & Macauley, of New Orleans, and therein and thereby directed them, sixty days after the date thereof, to pay to the order of Kirkman & Luke \$925 for value received, and to charge the same to account of fifteen barrels of castor oil per Pennsylvania; that Kirkman & Luke endorsed the bill for the accommodation of the plaintiff, who sold it to the defendants on the 16th of April, and that they were then the holders thereof. They further alleged that before the date of the check described in the petition (December 17, 1856) the plaintiff received of Oglesby & Macauley all the proceeds of the castor oil, amounting to more than \$925, and before the commencement of the suit (February 18, 1857) received of Oglesby & Macauley all money and the proceeds of all property which they ever had received for him or on his account. Wherefore they claimed that the plaintiff was indebted to them \$925 for money had and received, being the proceeds of said castor oil.

The plaintiff demurred to the counter claim for the reasons that it did not appear that the bill had ever been presented for acceptance or payment, or that the drawees had ever refused to pay it, or that notice had been given of its dishonor, or that the plaintiff withdrew the proceeds of the oil before the maturity of the bill; also because no excuse was shown why the bill had not been presented, either for the reason that the plaintiff had no right to expect it would be paid when he drew it, or that he had no funds in the hands of the drawees during the currency of the bill, and finally for the reason that the defendants did not show that they were entitled to the proceeds of the oil. The demurrer was sustained and judgment given for the plaintiff.

The engagement of the drawer of a bill is only conditional, that he will pay if the drawee be requested at the maturity of the bill to pay and refuses to do so and due notice of its dishonor be given; and generally he will be discharged from all liability unless the bill is properly presented on the day it ought to be. The holder, however, will be excused from making any presentment, if it is shown that the drawer had no right to draw, or had no funds in the hands of the drawee or expectation of funds, or there was no obligation of the drawee to accept, or the drawer having funds in his hands of the drawee during the currency of the bill had withdrawn the same before the bill matured. But until the contrary is shown, it will be presumed that the drawer had effects in the hands of the drawee, and had a right to draw upon him for the amount. (Chitty on Bills, 435.) And, even though the drawer had no funds or property in the hands of the drawee, he is entitled to have the bill duly presented and to receive due notice of its dishonor, if there was a fluctuating balance between them in the course of their dealings, or he had a reasonable expectation when he drew the bill that it would be paid, or if the drawee was under a promise to accept or had been in the habit of accepting without regard to the state of their accounts. (Dickens v. Beal, 10 Pet. 572.) If proper presentment is not made, or if made and the bill is dishonored and proper notice is not given, it is a presumption of law that the drawer has been damaged, and Chitty says that "almost the only allowed proof of the negative is that of the entire want of effects in the hands of the drawee continually, from the time of drawing the bill until and after the day it fell due, and this under such circumstances as to establish that the drawer had no right to expect the drawee or any other person to accept or pay." No case has been found in the books which decides that the holder of a bill is excused for having failed to present it at the proper time, because the drawer withdrew his funds after the time that the bill ought to have been presented.

Hamlin v. Duke.

These principles are well established ; and though instances occur every day, in which parties are allowed to take advantage of an omission by a person who would charge them when it is obvious that no injury has been sustained by reason of the omission, it would be unwise and would shake the stability of the law to multiply exceptions in order to save hard cases. If the plaintiff had withdrawn the proceeds of the oil before the bill matured, the defendants could easily have said so, but the form of the averment implies an admission that the funds were not taken away until after the bill became due. The answer says that before the drawing of the check, which was in December, the money was withdrawn, but the bill was due long before in June, and nothing is stated to repel the inference that the bill would have been paid if it had been presented.

The direction at the foot of the bill to charge to a particular account gave the defendants no interest in the oil ; (Kimball v. Donald, 20 Mo. 577 ;) but their only right was to the bill. And whenever it is incumbent on the holder of a bill to present it at the proper time and he neglects to do so, he will lose not only his remedy upon the bill, but also upon the consideration or debt in respect of which it was given or transferred. (Chitty on Bills, 354 ; Story, Prom. Notes, § 203.)

Judge Scott concurring, the judgment will be affirmed.

HAMLIN, Respondent, v. DUKE, Appellant.

1. An award, to be capable of enforcement according to the provisions of the act concerning arbitrations, must be in writing and made upon a written submission ; a parol submission and award will, however, be valid and binding if the subject matter of the controversy is such that a parol agreement in respect to it would be valid, and the award made is of such a character that the party in whose favor it is made has a remedy to compel its performance ; in such case the award may be pleaded in bar of a suit on the original cause of action.

Hamlin v. Duke.

*Appeal from St. Louis Law Commissioner's Court.**Bland & Coleman*, for appellant.

I. The court erred in refusing to instruct the jury as requested. The award was a bar to the suit. (15 Wend. 99; 2 Hill, 271; Kyd on Awards, 261, 10; 12 Johns. 311; 19 Wend. 285.)

RICHARDSON, Judge, delivered the opinion of the court.

The plaintiff brought an action before a justice of the peace, against the defendant, to recover damages for an injury done to his mule by the carelessness of the defendant's servant. It appeared on the trial that before the commencement of the suit, the parties submitted the controversy involved in this action to the arbitrament of two persons mutually selected by them, and agreed to abide by their decision, and that the arbitrators thus chosen made their award that the defendant should pay the plaintiff thirty-five dollars, of which they notified the parties. It was not shown that either the submission or the award was in writing or that the defendant had performed the award. The defendant asked among other instructions the following, which the court refused to give: "If the jury believe from the evidence in the cause that the plaintiff Hamlin and the defendant Duke submitted the matter in relation to the alleged injury complained of in the statement of the cause of action filed in this cause to arbitrators selected and agreed upon between them, and that such arbitrators made an award under such submission, and notified them of such award, then the plaintiff can not recover upon the cause of action filed in this cause."

To entitle an award to be enforced according to the provisions of the act concerning arbitrations and references (R. C. 1855, p. 193) it must be in writing, and so also must the submission; but the statute did not intend to destroy the legal effect of a parol award made under a parol submission.

Hight v. Robbins.

By the common law when the subject matter is such that a parol agreement between the parties would be valid, a verbal submission and award will be binding upon them. (Caldwell on Arb. 36 & notes, and 302 & notes.) The party has a remedy on an award whenever it creates a new duty, which is substituted for the original controversy, and he can not resort to his action on that which was referred. And whenever the party, in whose favor the award was made, has a remedy to compel performance, the award may be pleaded in bar of a suit on the original cause of action. A void award may sometimes be a good bar if performance is alleged, but an award without performance is a bar to an action on the original demand, if the parties have mutual remedies against each other to compel the execution of the matter awarded. It would be otherwise if there was no remedy for the thing awarded. (Gascoyne v. Edwards, 1 Younge & Jer. 19; 3 Chitty's Plead. 927, note; Armstrong v. Martin, 11 John. 188; Jessemin v. The Haverhill, &c., Iron Manu factory, 1 New Hamp. 68.)

The instruction was improperly refused and for that reason the judgment will be reversed and the cause remanded; the other judges concurring.

HIGHT, Appellant, v. ROBBINS, Respondent.

1. As a general rule the master of a steamboat navigating the rivers of the west has authority to hire pilots and other subordinate officers for the whole of a boating season; such contracts, in the absence of any limitation upon the master's general authority by custom or otherwise, would be binding upon the owner.

Appeal from St. Louis Court of Common Pleas.

This was an action against the defendant as owner of the steamboat "Editor" to recover wages alleged to be due plaintiff under a contract entered into by him to serve as pilot on said boat. In April, 1856, the steamboat Editor was running

Hight v. Robbins.

in the Upper Mississippi trade from St. Louis to St. Paul. James F. Smith was the master, and the defendant Robbins the owner. Said Smith hired the plaintiff to serve as pilot for the season of five months, at three hundred dollars per month. It was agreed that in case the Editor should lay up or for any reason cease to run as long as five months, then the plaintiff was to go on any other boat said Smith could find for him, or he, plaintiff, could get a chance to go on; and the wages he should earn on such other boat were to be credited in his account with the Editor. Plaintiff continued on board the Editor as pilot until about the 1st of July, when the boat ceased running. Plaintiff was then paid his wages up to that time. After the expiration of the five months for which the plaintiff was hired, the plaintiff made a settlement with Smith, the master, and, after deducting in accordance with the original agreement wages received by plaintiff for services rendered on other boats, it was found that the sum of four hundred dollars was due plaintiff. It was in evidence that each time the Editor came into port the defendant came down to the boat and received all her earnings. It also appeared that defendant was present when Captain Smith hired the other pilot of the Editor, who was hired about the same time and upon the same terms. He took part in the conversation and in making the contract. The court, at the instance of the defendant, instructed the jury as follows: "The jury is instructed that this suit is upon a special contract alleged by the plaintiff to have been made by the agent of the defendant; and there is no proof before the jury tending to show that the agent had any authority to make such a contract, and the jury should therefore find for the defendant." The plaintiff thereupon took a nonsuit, with leave, &c.

Henderson & Thomas and Hayden, for appellant.

I. The instruction given was clearly wrong. There was evidence on which the jury might well have found for plaintiff even on the ground of direct, though implied authority

Hight v. Robbins.

from the defendant to the captain to make the contract. The master is the authorized agent of the owner to hire the subordinate officers and crew of a boat or a vessel in a foreign or home port. (Story on Agency, § 116, 121, 300; Abbott on Shipping, 152, 216, 734, 794; Curtis on Merchant Seamen, 14, 18, 328.) Every mariner on his contract for service has a remedy against the owner as well as the maker, even though the owner took no part in the transaction and was unknown in it. This is so by the common law, (*Waite v. Gibbs*, 4 Pick. 298; 11 Johns. 72,) and by the admiralty law. (Gilp. 592; 3 Sumn. 286.)

Grover, for respondent.

I. No facts appeared in evidence from which the jury could legitimately infer or presume that defendant ever authorized Smith to make the contract sued on, or that defendant had any knowledge of its terms or conditions. No custom or usage was shown. The master can not bind the owner to pay for unemployed time or for services rendered upon other boats under the facts and circumstances disclosed in the pleadings and proofs in this case.

RICHARDSON, Judge, delivered the opinion of the court.

This case presents the question whether the master of a steamboat, within the duration of his own term of service, has the power to employ a pilot so as to bind the owner for a longer time than one trip of the boat.

The law is well settled that the master of a ship has the right to employ the mariners and appoint his subordinate officers either in the home or foreign port; but this power, it seems, is limited to a single voyage, and, though it is conceded that masters of steamboats have the same power, it is contended that it is limited to one trip of the boat. The ordinary voyage of a ship requires several weeks and most generally several months, whilst some of the boats, that navigate the waters of this state, make daily, some of them semi-weekly and weekly, trips; and few of them are out of

Hight v. Robbins.

port more than twenty days at a time. And, arguing from analogy, as the master of a ship employs those under him for a voyage, it would be reasonable to say that the master of a steamboat has the incidental authority to employ his subordinates for an ordinary boating season. The popularity and success of a boat depend very much on the character of its officers. Customers are drawn to a boat by the known skill and reputation of its officers, and public confidence would never be given to a vessel that changed its clerks, pilots or engineers every trip; and the best officers—who can command constant employment and permanent situations—would not take a berth on a boat which they were liable to lose at the end of every trip.

The clerk ought to know the trade and customers of the boat; the pilot should not only be familiar with the river, but ought to know the habits of the boat and the particular manner of landing it; and an engineer is certainly safer and more competent when attending to machinery that he is accustomed to manage. It is not only for the interest of the public, but it is better for the owners, that this power should exist; for if the pilots or other officers could only be employed by the master for a single trip or voyage, they would seek indemnity for the risk of losing their places by an increased compensation.

The power of a master in the temporary service of the owners, and engaged himself for only a single trip, would not reach to the extent of contracting with a pilot for a greater length of time than his own term of service; but we think his authority, coëxtensive with the duration of his right to command the vessel, extended to the employment of a pilot for the whole of one boating season; and this power is deducible from the nature of his employment and the necessities of commerce. This may be stated as the general rule, subject, of course, to the right of the owner to man his vessel as he thinks proper, and to such exceptions as the particular circumstances of each case may create, and the express or implied incidents to the trade in which the boat may

be engaged. This implied authority may be affected by the usages or customs of a particular trade, but, in the absence of evidence of any modification of the general rule by well established custom, we are not called on to say how far it would yield if a boat should change owners, or be destroyed, or be compelled to lay up, or go into a different trade or river.

It is said that there is no evidence in the record of any usage on the subject, and that we ought therefore to apply by analogy the law governing ships on the high seas to steamboats on the western rivers; but every one knows that many rules govern the navigation of the ocean that are inapplicable to the navigation of our rivers. Law is founded on reason, and, springing out of the necessities of society and the wants of commerce, it adapts itself with a wise flexibility to the new developments of trade and the increased and diversified interests of communities. An expanding and enriching commerce has grown up on the great rivers that bound and intersect this state, which has become an important and leading interest that ought not to be crippled by arbitrary rules that belong to another system, but it should be fostered by wise laws suggested by experience and adapted to its character and peculiar wants. We can not shut our eyes to the leading principles which, as individuals, we know govern it and have grown up with it; but the courts will take notice of such general customs as are founded in reason and enlightened public policy.

It appears from the evidence that the plaintiff was employed by the master as pilot of the defendant's boat for the term of five months, and that the master continued in command of the boat until after the expiration of the term for which the pilot was engaged; and as we think the master had authority to make the contract so as to bind the defendant, the instruction which the court gave that forced the plaintiff to take a nonsuit was erroneous.

The judgment will be reversed and the cause remanded; the other judges concurring.

Reed v. Pelletier.

REED *et al.*, Defendants in Error, v. PELLETIER *et al.*, Plaintiffs in Error.

1. A. conveyed a stock of goods in trust to secure certain notes in favor of B. In the deed it was stipulated that the property conveyed should remain in the possession of A. until the maturity of the notes secured, when, if they were not paid, the trustee might take possession and sell. A. remained in possession and continued to sell in the usual course of business. C., a creditor of A., sued out an attachment against A. on the ground that he had fraudulently conveyed and assigned his property so as to hinder and delay his creditors. *Held*, that the declarations of B., (he not being a party to the suit and being a competent witness for either party and not shown to have conspired with A.,) made in the absence of A., to the effect that A. had the right to sell the goods embraced in the deed of trust in the ordinary course of business, were inadmissible in evidence.
2. The constructive fraud against creditors, which exists where it is understood between the grantor in a deed of trust conveying a stock of goods and the *cestui que trust* that the former is to remain in possession and continue to sell in the ordinary course of business, is sufficient to support an attachment under the seventh clause of the first section of the attachment act.

Error to St. Louis Circuit Court.

This was a suit by attachment against Thomas A. Pelletier and John D. Pelletier. The affidavit charged that the defendants "had fraudulently conveyed and assigned their property and effects so as to hinder and delay their creditors. There was a plea in abatement denying the truth of the affidavit. Upon the trial of the issue raised by this plea, the following facts, among others, appeared: Defendants, being indebted to the firm of Hugh Boyle & Co. in the sum of \$1,737, executed a deed of trust conveying their stock in trade to a trustee to secure said indebtedness evidenced by notes therein described. This deed contained the following stipulation: "It being understood that the property may remain in the possession of the said parties of the first part until default of payment as aforesaid," &c. The deed was duly acknowledged and recorded. The notes were not paid and the trustee took possession and advertised the property

for sale. Before a sale the levy of the present attachment was made. Evidence was introduced by plaintiffs to show that at the time of the execution of the deed of trust the defendants were embarrassed pecuniarily, and that the stock of goods was worth more than the debt secured by the deed of trust amounted to. A witness called by plaintiffs was permitted to state, against the objections of the defendants, that Boyle had said to him in conversation that he had given the defendants permission to hold possession of the goods and settle with their creditors, and that they had from him a right or permission to continue selling the goods in the store in the usual course of business; and that he (Boyle) supposed the defendants had stock on hand worth some six or seven thousand dollars. Boyle, called as a witness for defendants, denied having made these statements.

The court, at the instance of the plaintiffs, gave the following instructions: "1. If the jury believe from the evidence that the deed of trust of defendants to Boyle & Co. was made with intent on the part of the defendants to hinder or delay the other creditors in the collection of their debts, then they will find for the plaintiffs. 2. If the jury believe from the evidence that there was an agreement between defendants and Boyle & Co., at the time of executing the deed of trust and afterwards, that defendants should continue in the possession of the goods and property therein conveyed, with the privilege to sell and dispose of the same in the usual course of business or trade for their own account and benefit, and that said defendants did remain in possession of the same from the date of the deed until after attachments were levied upon them, and continued from time to time to sell and dispose of portions of such property for their own use, then the jury will find the issues for the plaintiffs. 3. If the jury believe from the evidence that the deed of trust of defendants to Boyle & Co. was made for the purpose of covering up their property therein named and to enable them to obtain settlements from their other creditors

Reed v. Pelletier.

on terms of discount from the sums really due, then they will find for plaintiffs.

The following instructions asked by defendants were refused: "1. The defendants had a lawful right to make the deed of trust given in evidence to secure the debt named therein to Boyle & Co.; and if the jury find from the evidence that said deed was made to secure a *bona fide* debt due to Boyle & Co. by defendants, then the said deed is not any evidence of fraud on the part of the defendants as against their creditors. 2. The possession of the store and goods of defendants had and held by them after the execution of said deed of trust, and the sale of articles of goods from time to time by the defendants in the ordinary course of business, is no evidence of fraud in the conveyance or assignment of these goods as charged in the affidavit of the plaintiffs, if the jury find from the evidence that said deed was made fairly to secure an honest debt, and that defendants acted honestly and fairly in making said deed and in making the said sales of their goods after the execution of said deed. 3. The question of fraud in this case is one of intent, and if the jury find from the evidence that the deed was fairly made to secure a *bona fide* debt, and that there was no intent to defraud on the part of the defendants or Boyle & Co., and that the sales of the goods afterwards were honestly made in the regular course of their business, without any agreement on the part of Boyle & Co., outside the deed of trust, that they should have the right to sell the goods, then the fact that such sales were made furnishes no evidence of fraud in the absence of further proof that the proceeds of such sales were fraudulently disposed of so as to hinder, delay and defraud their creditors."

The court, at the instance of the defendants, gave the following instruction: "Fraud is not to be presumed in any case, but must be proved, and the burden of proving the fraud charged in this case is upon the plaintiffs."

The jury found for the plaintiffs.

Reed v. Pelletier.

N. Holmes and B. A. Hill, for plaintiffs in error.

I. The testimony of Gill as to conversations with Boyle was inadmissible. (15 Mo. 383.)

II. The deed of trust contained no evidence of fraud on its face. The first instruction asked should have been given. It did not come within the cases of *Brooks v. Wimer*, 20 Mo. 503, *Zeigler v. Maddox*, 26 Mo. 575, as to facts constituting fraud appearing on the face of the deed. Nor within that of *Stanley v. Bunce*, 27 Mo. 269. The fact that defendants of their own motion continued selling the goods in the usual course of business, in the absence of any proof that they fraudulently disposed of the proceeds, was of itself no evidence that the conveyance was fraudulent. The second and third instructions should have been given. (15 Mo. 420; 5 Tenn. 235; 3 M. & S. 371.) The fraud must be actual fraud to support the attachment. Constructive fraud is not sufficient. (25 Mo. 378, 416; 10 Mo. 50; 14 Mo. 597; 19 Mo. 29; 19 Mo. 656.)

Biddlecome, for defendants in error.

RICHARDSON, Judge, delivered the opinion of the court.

The plaintiffs sued out an attachment against the defendants on the ground that they had fraudulently conveyed or assigned their property so as to hinder, delay or defraud their creditors, and the defendants filed their plea in the nature of a plea in abatement traversing the truth of the affidavit. It appeared, on the trial of the issue made on the affidavit, that the defendants had made a deed of trust conveying their stock of goods in the store kept by them as merchant tailors for the purpose of securing an indebtedness to *Hugh Boyle & Co.*, which contained a stipulation that the property conveyed should remain in the possession of the defendants until the notes became due, when, if they were not paid, the trustee should have the right to take possession and sell. There was evidence tending to show that the defendants remained

Reed v. Pelletier.

in possession of their store and continued to sell the stock of goods included in the deed in the usual course of business until the trustee took possession. For the purpose of applying to the deed the principle decided by this court in the cases of *Brooks v. Wimer*, 20 Mo. 503, *Walter v. Wimer*, 24 Mo. 62, and *Stanley v. Bunce*, 27 Mo. 269, a witness called by the plaintiffs was allowed to repeat, against the defendants' objections, a conversation he had had, in the defendants' absence, with Mr. Boyle, in which the latter had stated that the defendants had the right to sell the goods in the ordinary course of business.

When the maker of a deed of trust or mortgage that conveys a stock of goods continues in possession and sells in the usual course of business, with the knowledge of the *cestui que trust*, very slight evidence ought to be required to prove that his dealing in that manner with the property was pursuant to a right secured contemporaneously with the execution of the instrument, which would stamp the transaction with constructive fraud, at least, as effectually as if the provision had been incorporated into the deed. But when the *cestui que trust* is not a party to the suit, and is a competent witness for either of the parties, and is not shown to have been in any conspiracy with the person to be affected by his declarations, we do not see on what principle his declarations, which are mere hearsay, are admissible, and in our opinion the declarations of Boyle were improperly received as evidence against the defendants.

The term fraud, as understood in the statute concerning fraudulent conveyances, has the same meaning in the attachment law, and it is not necessary to show that the act originated in any meditated design to commit a positive fraud or to injure other persons. There are many acts not the result of intentional fraud which the law, nevertheless, from their tendency to deceive other persons, or from their injurious consequences to the public, prohibits as being within the same reason and mischief as actual fraud. And whatever, by the judgment of the law, is denounced as fraudulent must

Fatchell v. St. Louis & Iron Mountain Railroad Co.

be regarded in the same light in reference to an act or transaction which is made the ground of an attachment; and if the act charged to have been committed is fraudulent, actual or constructive, it will be inferred that the party intended its natural and ordinary results should follow. There are thirteen cases in which an attachment may issue under our statute, and it will be observed that the "intent" of the party liable to the writ is not a necessary ingredient except for the causes enumerated in the fifth and sixth clauses of the first section. (R. C. 1855, p. 238.) The affidavit will be good if it follows the language of either of the clauses, and it is never necessary to prove more than the party is required to swear to. If the attachment is based on either the seventh, eighth, ninth or tenth clauses, it will be sustained on proof that the defendant fraudulently had done or was about fraudulently to do any of the prohibited acts; and whether the act be fraudulent will depend on the judgment which the law pronounces upon it.

The other judges concurring, the judgment will be reversed and the cause remanded.

FATCHELL, Appellant, v. ST. LOUIS & IRON MOUNTAIN RAILROAD COMPANY, Respondent.*

1. The charter of the St. Louis and Iron Mountain Railroad Company did not confer upon a justice of the peace jurisdiction of an action against the company to recover damages for injuries sustained by reason of the construction of a culvert.

Appeal from Washington Circuit Court.

Elmer, for appellant.

S. A. Holmes, for respondent.

* This cause was submitted at the October term, 1858, of the supreme court.—[REP.]

Fatchell v. St. Louis & Iron Mountain Railroad Co.

RICHARDSON, Judge, delivered the opinion of the court.

The plaintiff commenced, before a justice of the peace, a suit in the nature of an action on the case for an injury to his premises caused by the construction of a culvert. The only question presented in the record is whether the justice had jurisdiction of the case.

The thirty-eighth section of the act concerning railroad corporations declares that "all existing railroad corporations shall be exempt from the jurisdiction of justices' courts, except as in this act and in their own charters provided." (R. C. 1855, p. 430.) That act imposes penalties on railroad companies for doing or omitting to do several things, and the fifty-first section provides that all penalties imposed by the act may be sued for in the name of the state, and "if such penalty be for a sum not exceeding one hundred dollars, then such suit may be brought before a justice of the peace;" so that there is something on which the exception in the thirty-eighth section can operate. The defendant was incorporated March 3, 1851, (Sess. Acts, 1851, p. 479,) and the first section of the charter, enumerating its corporate powers, declares, among things, that it "may sue and be sued, plead and be impleaded, defend and be defended, in all courts and places whatsoever;" and it is argued that this language conferred jurisdiction on justices of the peace, and that therefore the defendant is brought within the exception contained in the thirty-eighth section of the railroad law. The words are "may sue and be sued in all courts and places whatsoever." Now it will not be contended that the defendant can be sued before a probate or county court, or before a justice of the peace, without reference to the nature of the action or the amount in controversy, or that a suit could be brought in a county remote from the line of the road where neither the plaintiff nor any of the officers reside; and therefore the language is to be construed in a qualified sense, and the right to sue and the liability to be sued are to be exercised and controlled by the provisions of the general law. By the

revised code of 1835 and 1845 the jurisdiction of justices of the peace in actions against corporations, was expressly denied, and prior to 1851 many charters were granted containing clauses similar to the one under consideration but it was never supposed that they were intended to confer a jurisdiction positively prohibited by the general law. (R. C. 1835, p. 348 ; R. C. 1845, p. 635.) It was not until 1851 (Sess. Acts, 1851, p. 232) that corporations could be sued in justices' courts, and the statute was passed on the idea that such jurisdiction had not previously existed. We do not think that the clause in the defendant's charter was designed to give jurisdiction to justices of the peace, and the judgment will be affirmed ; the other judges concur.

BOEKA, Plaintiff in Error, v. NUELLE, Defendant in Error.

1. A promissory note may be transferred by delivery for a valuable consideration without endorsement or written assignment so as to enable the assignee to maintain an action thereon in his own name.

Error to St. Louis Law Commissioner's Court.

The promissory note upon which this suit is founded is negotiable.

Farish, for plaintiff in error.

Goodlett, for defendant in error.

RICHARDSON, Judge, delivered the opinion of the court.

The only question of law discussed in the briefs is whether the holder of a promissory note, who acquired it for a valuable consideration, can maintain an action upon it in his own name without an endorsement or a written assignment.

A party claiming to be the owner of a note transferred merely by delivery has only an equitable title to it ; and, before the practice act of 1849 was adopted, he could not in

Bredow v. The Mutual Savings Institution.

such a case maintain an action on it in his own name, but was compelled to bring suit in the name of the payee to his use, after a bill in equity. But by the law as it now stands there is only one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs, which is denominated a civil action; and every action must be prosecuted in the name of the real party in interest, except as provided in the second section of the second article of the practice act; (R. C. 1855, p. 1217;) so that an action can now be maintained in the name of the holder of a note transferred to him merely by delivery. (Savage v. Bevier, 12 How. Prac. 160; Billings v. Jane, 11 Barb. 620; Edwards on Bills and Prom. Notes, 286.) It seems, however, that a note transferred in that way will be subject to every defence which the maker had against it at the time of or before notice of the transfer.

All the points made at the trial were ruled in the plaintiff's favor, and as no instructions were asked or given, we can not see that the court decided or was called on to decide any question of law. It may be that the only witness who was examined was not credited, and as nothing was saved by the bill of exceptions the judgment must be affirmed; the other judges concur.



BREDOW, Respondent, v. THE MUTUAL SAVINGS INSTITUTION,
Appellant.

1. Upon the dissolution of a partnership by the death of a partner, the surviving partner may proceed to wind up and settle the affairs of the partnership without giving bond as required by the fifth section of the first article of the act respecting executors and administrators; he may transfer a promissory note held by the partnership in payment of a partnership debt or liability.
2. Should the surviving partner fail, within the time limited, to give bond as required by the fifty-fifth section of the first article of the administration act, he is liable to be ousted from possession of the partnership effects, and divested of the right to administer on the same, by the executor or admin-

Bredow v. The Mutual Savings Institution.

- istrator of the deceased partner, if the latter should give bond as required by the fifty-ninth section of the first article of said act.
3. In an action in the nature of an action of trover for the conversion of a promissory note, the measure of damages, *prima facie*, is the amount called for on the face of the note.
 4. In a suit against a corporation, a stockholder thereof is a competent witness in behalf of the corporation. (*Barclay v. Globe Mutual Insurance Co.* 26 Mo. 490, affirmed.)

Appeal from St. Louis Court of Common Pleas.

Alpheus E. Koehls and Henry Golberg were partners in trade under the style of Koehls & Golberg. They held two promissory notes payable to their order as partners. These notes, during the existence of the partnership, were endorsed to the Mutual Savings Institution for collection and as collateral security for an indebtedness then existing from Koehls & Golberg to said institution. On the 27th of August, 1856, the partnership was dissolved by notice. A few days thereafter Golberg died, and on the 29th of September, 1856, his widow received letters testamentary and qualified as executrix. She included in her inventory the whole of the partnership property, but did not give the further bond required by the statute to authorize her to administer on the partnership effects. On the 16th of October, 1856, Koehls gave a power of attorney to one Rudolph Macwitz authorizing him among other things to settle up the affairs of the late firm of Koehls & Golberg. Koehls never gave bond as surviving partner under the provisions of the administration act. On the 1st of December, 1856, Macwitz, acting under his power of attorney, assigned said two notes to the firm of Bredow & Schaffler. This transfer to Bredow & Schaffler was made to secure them against their liability on an accommodation endorsement of a promissory note which they had made in behalf of the firm of Koehls & Golberg. On the 2d of December, 1856, this assignment was presented to the Mutual Savings Institution and the notes were demanded. They were not given up. The indebtedness of Koehls & Golberg to said institution, to secure which said notes were endorsed

Bredow v. The Mutual Savings Institution.

to said institution, was paid and extinguished December 12, 1856. Said notes were never collected by the Mutual Savings Institution. The letters of Mrs. Golberg were revoked and on the 6th of January, 1857, one Charles Enslin was appointed administrator *de bonis non* of the estate of Golberg, and gave the bond required by the fifty-ninth section of the first article of the administration act, and undertook the administration of the partnership estate according to the provisions of the act. On his demand, the Mutual Savings Institution gave the notes up to him. The present suit was instituted by Bredow (to whom Schaffler had assigned his interest in the notes) to recover damages for the alleged wrongful conversion of said notes. On the trial, John Cavender, president of the Mutual Savings Institution and a stockholder therein, was offered as a witness on the part of the defendant, and excluded for the reason that he was a stockholder.

N. Holmes, for appellant.

I. Enslin was the only person entitled by law to demand and have from the defendant the possession of the notes in question. The surviving partner has no right to administer on the partnership estate unless he gives bond as required by the statute. The surviving partner had no power to endorse and assign in the name of the firm notes held by the firm, even in the settlement of debts. (3 Kent, 63; 13 Verm. 452, 522; 5 Geor. 166; 2 Gratt. 372; Sto. on Part. § 322; 3 Esp. 108; 1 H. Bl. 155; 4 Johns. 224; 1 Humph. 51.) The power of attorney conferred no such power on Macwitz. (3 Snead, 508; 18 Pick. 505.) These notes having been endorsed to the defendant before the dissolution of the firm, the legal title to the instruments and the possession were in the defendant, and the supposed assignment by attorney could only give to the assignee an equitable interest in the proceeds of the notes when collected by the institution, but no right to demand the possession of the notes themselves. The assignment under the power could transfer nothing but his inter-

Bredow v. The Mutual Savings Institution.

est as a tenant in common in the final balance of the partnership accounts when adjusted by the person entitled to administer on the partnership estate. The administrator was that person under the statute. The notes having been endorsed to the institution as collateral security, the burden of proof was thrown on the plaintiff to show that the debt had been paid off before demand was made for the notes. The fifth instruction should have been given.

H. The court erred in excluding the testimony of Caven-der. (*Barclay v. Globe Mutual Ins. Co.* 26 Mo. 490.)

III. Even if trover could be maintained for the notes as such, no more could be recovered than the value proved. It was proven that the notes were in suit in Iowa and Illinois.

Gardner, for respondent.

I. The surviving partner had the right to apply the partnership assets to the payment of partnership debts prior to administration upon the partnership estate. If Koehls could have transferred the notes himself he could do it by attorney. Enslin was not appointed administrator until more than a month after plaintiff's right of action accrued. His subsequent appointment could not affect plaintiff's rights. (See 7 N. H. 567; 6 Pick. 360; 6 Cow. 441; *Watson on Part.* 267.) It was not necessary that Koehls should give bond as provided by the administration act.

RICHARDSON, Judge, delivered the opinion of the court.

The main questions in this case are, whether the statute regulating the administration of partnership estates (*R. C.* 1835, p. 121) prohibits a surviving partner from winding up and settling the partnership concerns unless he first gives bond with security for the faithful discharge of his duties; and next, whether a surviving partner, independently of the statute, has authority to pass the legal title to a partnership note when transferred in payment of a partnership debt.

If the surviving partner executes a bond as provided in the fifty-fourth and fifty-fifth sections of the act, he can not be

Bredow v. The Mutual Savings Institution.

disturbed by the personal representatives of his deceased partner in the possession of the partnership property and in the right to use it in any manner consistently with the primary duty of closing the partnership affairs. He ought to give the bond required by law whenever he undertakes to wind up the partnership estate, and, if he fails to do so for the period of thirty days after letters testamentary or of administration have been granted on the estate of the deceased partner, he is liable at any time to have the business taken out of his hands; but this power as surviving partner is not suspended until he gives a bond; nor is it superseded by the mere appointment of an administrator of the deceased partner; for the administrator as such has no right to administer upon the partnership effects without giving an additional bond. (R. C. 1855, p. 124, § 59.)

The grant of letters testamentary to Mrs. Golberg gave her no authority to interfere with the partnership property, because she did not give the further bond required by law; and though Koehls omitted to give a bond as surviving partner, his authority continued until superseded by the appointment of Enslin as administrator *de bonis non*, who gave both of the bonds required by the statute; and until he qualified all the rights of the surviving partner remained unaffected by the statute, though he did not attempt to comply with it.

The dissolution of a partnership as between the partners themselves operates as a revocation of their joint power to employ the property or funds of the partnership any longer in the business or trade thereof. As soon as the partnership ceases, the partners become tenants in common of all the partnership property and effects; and neither of them can create new contracts binding upon the partnership, nor buy or sell goods on account thereof, nor endorse or transfer the partnership securities; (McDaniel v. Wood, 7 Mo. 543; Long v. Story, 10 Mo. 636;) but each of the partners has authority to collect and pay debts, to adjust unliquidated accounts, to receive any property belonging to the firm, and to apply the partnership assets and effects to the payment of

its liabilities; for these rights and powers remain as indispensable to the final settlement of the affairs of the partnership, and are subordinate to the paramount duty of the partners to wind up the partnership concerns with diligence and in good faith for their mutual interest. The authority of one partner, which is implied from a partnership, to act for another, is revoked the moment the partnership ceases; and as the partners then become only tenants in common of the property and assets undisposed of, one of them, without the consent of the others, can not transfer the title to any of the partnership securities, and all of them must join in an action to recover any of the outstanding debts. The reason of this is not simply because one partner after a dissolution can not by his endorsement of a note create a new liability binding upon the others, but because, only having an undivided interest in a partnership note, he can not, without the consent of the other partner, transfer the title to the whole of it.

When, however, a partnership is dissolved by death, although the personal representatives of the deceased partner become tenants in common with the survivor of all the partnership property and effects in possession, they do not become tenants in common of the *choses in action* belonging to the partnership, for they belong to the survivor. The legal title to them by operation of law is cast upon the survivor, and he has the exclusive right to reduce them into possession and must sue upon them in his own name without joining the representatives of the deceased partner, though he will be accountable to the partnership for whatever he collects. (Story on Part. § 346.) This is upon the principle that though chargeable as a trustee for the proceeds of partnership notes when received, the legal title to them is in the survivor; and if he has the legal title, he can transfer them, although his endorsement may not affect the estate of his deceased partner with any remote or contingent liability. It is a mere question of power.

Upon the death of Golberg, the title to the partnership notes vested in Koehls, as surviving partner, and he had the

Chouteau v. Magenis.

power, before Enslein qualified, to transfer the notes in controversy to the plaintiff in payment of a partnership liability. He did not thereby impose any new obligation on the partnership, but on the contrary paid a firm debt, and reduced the partnership liabilities to that extent.

The proposition contained in the fifth instruction asked by the defendant is embraced in an instruction given by the court.

The measure of damages, in an action of trover for the conversion of a *chose in action*, is, *prima facie*, the amount that appears to be due on it, subject to be reduced by proof showing that it is of less value than it calls for. (O'Donoghue v. Corby, 22 Mo. 393; Menkins v. Menkins, 23 Mo. 252.) The circumstance that the notes in controversy were in suit, we do not think was evidence that the makers of them were insolvent or that the principal and interest due on them would not be collected, but perhaps the reasonable expenses for collecting them ought to be deducted from any recovery against the defendant.

On the authority of Barclay v. Globe Mutual Insurance Co., 26 Mo. 490, the court improperly excluded Mr. Caverder as a witness on the ground that he was a stockholder in the defendant, and for that reason the judgment will be reversed and the cause remanded; the other judges concur.



CHOUTEAU, Plaintiff in Error, v. MAGENIS *et al.*, Defendants
in Error.

1. The legislature of the former territory of Missouri had no power by legislative act to grant divorces. (Per NAPTON, Judge; SCOTT, Judge, not concurring, holding that the territorial legislature had such power.)

Error to St. Louis Court of Common Pleas.

This was an action instituted to recover possession of an undivided interest in a certain lot in the city of St. Louis. Pelagie Labadie, at the time of her death prior to the year

Chouteau v. Mageniz.

1814, owned a lot on Main street in St. Louis. At her death said lot descended to her children, Sylvestre Labadie, Emilie Pratte, Pelagie Sarpy, Sophie Chouteau, (the plaintiff in the present suit and at that time wife of Auguste P. Chouteau,) and Marie Antoinette Honey (at that time wife of John W. Honey). In 1814, the said heirs of Madame Labadie (except Mrs. Honey) conveyed their interest in said lot to said John W. Honey. On the 22d of January, 1816, the legislature of the territory of Missouri passed an act to divorce said Honey and wife.* (See Sess. Acts, 1816, p. 80.) On the 23d of January, 1816, said John W. Honey conveyed his interest in said lot to said Marie Antoinette Honey. This deed was a direct conveyance in the ordinary form. Said Marie afterwards married John Little and died in the year 1818, without issue, leaving her surviving the said John Little and her three sisters (including plaintiff) and one brother mentioned above. John Little died in 1832, and his interest was sold, under a judgment against his administrator, to John P. Schatzell. On the 13th of June, 1827, the four heirs of said Marie Antoinette Little, including plaintiff and her husband, conveyed the north half of said lot to Robert Rankin, bounding it south by the "lot of John P. Schat-

* This act is as follows: "An act to divorce John W. Honey and Marie Antoinette his wife, late Marie Antoinette Labbadie, from the bonds of matrimony. *Be it enacted by the General Assembly of the Territory of Missouri, That* from and immediately after the passage of this act, the matrimonial bond and civil contract of marriage existing between the aforesaid John W. Honey and Marie Antoinette his wife, late Marie Antoinette Labbadie, shall be and the same are hereby completely annulled, set aside and dissolved as fully and as effectually as if no such contract or union had ever been made and entered into between them. Sec. 2. *And be it further enacted,* that from and immediately after the passage of this act, the said John W. Honey and Marie Antoinette his wife, late Marie Antoinette Labbadie, shall in future be held as distinct persons, altogether unconnected by any mystical union or civil contract whatsoever at any time heretofore made or entered into between them. And the said Marie Antoinette Honey, late Marie Antoinette Labbadie, shall be taken and considered as *feme sole*, enjoying the separate protection of the law in her person and property, and free from the constraint and coercion of the said John W. Honey forever. This act to take effect from and after its passage."

Chouteau v. Mageniz.

zell." This deed was defectively acknowledged. In partition proceedings between Rankin and Schatzzell, in 1828, the entire lot was sold to Rankin. In 1828 said Rankin conveyed the south half of said lot to Arthur L. Mageniz. On the 20th of January, 1848, Sophie Chouteau sold and quitclaimed to Rankin the north half of the entire lot. In this deed the deed of 1827 is referred to. Auguste P. Chouteau died in 1838. Arthur L. Mageniz went into possession in 1828, and possession under him has continued uninterruptedly until the present time. He made valuable improvements. The plaintiff claimed to recover one-eighth of that portion of the lot which was conveyed to Mageniz. The court, by its instructions to the jury, ruled that the divorce of Honey and wife was void; that the deed from Honey to his wife Marie Antoinette Honey was inoperative as a conveyance to the wife.

The plaintiff recovered one-fortieth of the lot sought to be recovered. Writs of error were sued out by both plaintiff and defendants.

E. Bates, for Sophie Chouteau.

I. Admitting for the purposes of this case that the territorial legislature had no power to grant a divorce, still the deed from Honey to his wife was a good and valid conveyance of the land even though the marriage remained undissolved. It was good according to the common law as introduced into the territory in a modified form by the act of Jan. 19, 1816. The common law thus introduced is not identical with the English common law. (See 2 Louis. 521, 556.) By the English common law such a conveyance would be void. (1 Bl. Com. 442; Co. Lit. § 168.) This rule is arbitrary and technical in its character, and is habitually evaded in practice. A wife may take an estate from her husband through the medium of the statute of uses. (See 1 Mo. 553.) It is practically adjudged that man and wife are two. The husband may convey and she may take. If the land did not pass to Mrs. Honey, what became of it? It was no longer

Chouteau v. Magenis.

the grantor's. It is like the case of an alien. The deed was good under the common law at the day of its date.

II. But supposing it bad at common law, still it is good under the territorial act divorcing Honey and wife. The second section of said act is distinct from the first, and grants to the woman personal independence, proprietary rights and legal protection apart from her husband. Supposing the first section void, the second is an independent grant of rights and powers to the married persons notwithstanding the marriage while it existed. The power of the legislature to pass said section is not disputed. It is a power strictly within the terms of the organic law of June 4, 1812.

III. The defendants are estopped to deny the legal validity of the deed, for they are privies to it and claim even on this record under that deed.

F. A. Dick, for Magenis and others.

I. The court committed no error in instructing the jury that the deed from John W. Honey to his wife was inoperative. (See *Frissell v. Rozier*, 19 Mo. 448; 1 Co. Litt. 130; *Reeves Dom. Rel.* 90.) As Mrs. Honey could take nothing by this deed, she never had more than one-fifth of the property, one-eighth of which vested in Mrs. Chouteau.

II. The court committed error against the defendants. The deed of 1827 was well executed by Mrs. Chouteau. (*Lindell v. McNair*, 4 Mo. 380; 10 Mo. 320; 5 Mass. 454.) The act of 1825 in relation to conveyances should be held to apply to rights acquired after the law went into effect. (See 20 Mo. 170, 227, 269.) The deed of 1848 ratifies and confirms the deed of 1827. If the deed of 1827 be held valid, it operates as an estoppel against plaintiff. It calls for the lot on the south as *Schatzell's*. The marriage contract of 1809 established a community between *Auguste P. Chouteau* and the plaintiff. He as head of the community could sell the property that entered into it. The court erred in refusing to give the instruction authorizing the jury to find the plaintiff estopped.

Chouteau v. Mageniz.

NAPTON, Judge. If the legislative divorce in 1816 be treated as a nullity and John W. Honey survived his wife, the interest of the plaintiff in the premises is one-fortieth; and if that interest has not been disposed of or in any manner barred, the judgment of the court of common pleas was of course correct. If the legislative divorce and subsequent deed and marriage be upheld, Mrs. Chouteau's interest in the premises is one-eighth upon the supposition that the deed of June, 1827, was inoperative, and that no subsequent act of hers operated to convey her interest.

We have been unable to perceive any principle which would authorize this court to give efficacy to the second section of the divorce act of 1816, disregarding the first. Whatever construction the language of that section might admit of if it were an independent enactment, it is plain that its provisions were made altogether in reference to the subject matter supposed to have been provided for and attained in the first section. The powers conferred on Mrs. Honey, whatever they were, were not supposed to be given to her as a married woman. They were conferred as a consequence of the divorce previously granted. The legislature had no intention of distinguishing the marital relations and their incidents of John W. Honey and his wife, whilst they retained this relation to each other, from those incident to any other man and wife in the territory. Aside from the provisions of this act, the deed from John W. Honey to his wife can not be sustained on common law principles, or on such modifications of them as existed in this territory at that time. (*Frisell v. Roper*, 19 Mo. 448.)

The deed of June, 1827, not being operative to convey the plaintiff's interest in the lot, because not executed in the mode which the law then made essential, there is nothing done by her to affect her title until January, 1848, when she conveyed to Rankin her interest in the north half of the lot. To construe this last deed, not only as giving efficacy to the deed of 1827 for the northern half of the whole lots, but as an adoption of its recitals so as to estop her claim to the south

Chouteau v. Mageniz.

part of the lot, would be contrary to the plain intent of the instrument, which only professed to convey her interest in the north half owned by Rankin.

It is clear that the partition proceedings in 1827 can not in any way affect the plaintiff's interest, as she was no party to them, nor in any manner concurred in them.

The decision of the case, then, depends altogether upon the validity of the divorce law of 1816. On this subject I have only to say, that the decisions of this court, made without my concurrence, have determined me to let the judgment of the court of common pleas stand. It is true that these decisions are mainly based upon a provision of our state constitution prohibiting one department of the government from exercising powers properly belonging to another, but they are also to some extent placed upon the ground that marriage is a civil contract and within the provision of the constitution of the United States which prohibits the passage of a law impairing its obligations. Although not responsible for the reasoning or conclusion of the court in these cases, I am not prepared to say that the legislature of the state had any less power on this subject than the territorial legislature which preceded it; and this conclusion is strengthened by observing that as early as 1807 there was a territorial law making ample provisions for divorces, which, with some modification, was reenacted in 1816. Moreover, the question, we may reasonably presume, is likely to prove a mere abstraction, except so far as the disposition of the present case is concerned, and there is no peculiar hardship in its facts and circumstances which prevents the enforcement of the previous adjudications on this subject.

Judgment of common pleas affirmed.

SCOTT, Judge. I do not concur in affirming this judgment. The territorial assembly, in my opinion, had authority to grant divorces, which is a different question from that arising on the right of the general assembly to do so under our state constitution as it was originally framed.

Magwire v. Marks.

In the cases in which this question has arisen, all of which were under the constitution, the argument mostly relied on against legislative divorces was derived from the provisions of our constitution. No such restrictions existed under the territory on the legislative power. The general result of the American authorities is that the granting of divorces by the legislative power is not the exercise of such a judicial authority as will render them invalid. (Bishop on Marriage and Divorces, § 792.) Under such circumstances, there is no propriety in extending the principle of the decisions made heretofore by this court further than the ground on which they stand will warrant.



MAGWIRE, Plaintiff in Error, v. MARKS, Defendant in Error.

MAGWIRE, Plaintiff in Error, v. MARKS, Defendant in Error.

1. If a levy of an execution be made upon property not belonging to the defendant therein and such execution returned satisfied to the amount made by the execution sale, should the plaintiff in the execution be compelled to refund to the true owner the amount received by him from such sale, he will be entitled to have the satisfaction endorsed on the execution set aside and to have an execution issue for the full amount of the judgment.
2. A. recovered a judgment against B. Execution was issued thereon and levied by order of A.—he giving the plaintiff an indemnification bond—on certain personal property in possession of B. but known by A. to be claimed by C. as trustee for the wife of B. The sheriff made sale of the property levied on, and the amount made was endorsed on the execution in *pro tanto* satisfaction thereof. C. sued the sheriff and recovered judgment against him for the amount made by said levy and sale, with interest, which was paid by A. *Held*, that A. was entitled to have the sheriff's return vacated and set aside so far as it stated a partial satisfaction of the execution, to have the same amended in accordance with the facts, and to have an execution issue for the whole amount of the judgment.

Error to St. Louis Court of Common Pleas.

On the 9th of January, 1843, John Magwire recovered a judgment in the St. Louis court of common pleas against Dennis Marks for \$1,575.35, and on the 21st of April, 1843,

Magwire v. Marks.

Magwire recovered another judgment against said Marks for \$960.54. On the 3d of December, 1847, executions issued upon these judgments, and the sheriff by direction of Magwire levied the same on certain personal property. A sale was made under these levies and the amount made was credited *pro rata* upon the two executions. Magwire afterwards filed his motions to vacate the satisfaction entered by the sheriff in his returns on the executions. These motions were heard upon the following agreed statement of the facts: "It is agreed by the parties in the cause that Samuel Conway was sheriff of St. Louis county at the time the execution on the judgment in this cause was levied; that he as such sheriff, by the direction of the plaintiff, levied on the property endorsed on said execution as the property of the defendant; that at the time of said levy the said property was in the possession of the defendant; that at the time of the levy the sheriff was notified that Marks held the property only as agent of Luther C. Clark, trustee of Amira Marks, wife of defendant, and thereupon the sheriff suspended further proceedings until he was indemnified by Magwire, the creditor, who directed the sheriff to proceed upon the levy; that the amount endorsed on said execution as having been made by said sheriff is the proceeds of the sale of said property to various purchasers at the sale and which was paid over to the plaintiff by said sheriff; that formal bills of sale were made to the various purchasers according to the statute law; that afterwards Luther C. Clark, trustee of Amira M. Marks, wife of defendant, instituted a suit in this court against said Conway, sheriff aforesaid, to recover the value of said property levied upon under said execution, and such proceedings were had in said suit that said Clark recovered judgment at the ——— term, 1855, of said court for the value of said property against said Conway, amounting to \$4,842.18 and costs; that the plaintiff indemnified said sheriff before the said property was sold; and the plaintiff having notice of the claim of said Clark took upon himself the defence of the last mentioned suit, and after judgment and before this motion or

Magwire v. Marks.

notice thereof given to defendant, said sheriff Conway paid said judgment, and by reason of the recovery of said judgment the plaintiff, on account of his bond of indemnity, did pay a sum equal to the whole amount exclusive of interest that he had received from said sheriff and also all the costs, fees and commissions retained by him as having been made by the sale of said property under said execution; that Dennis Marks, the defendant, assuming to act as agent for his wife's trustee, Clark, was active in causing said claim of said Clark to be made, and said Marks employed counsel to institute and prosecute said suit against said Conway to recover the value of said property; and after final judgment and execution, and after the plaintiff had paid and refunded said money and satisfied said judgment in said suit against said Conway, said Marks recovered the amount of said judgment, to-wit, \$5,300, from the sheriff of St. Louis county, but the defendant, in all that he did in respect to said property, claimed that he was acting only as agent of Luther C. Clark, the trustee of the wife of defendant—the said Clark at the time of said levy and sale being absent in a distant state; and he executed to defendant Dennis Marks a power of attorney, which was duly executed and recorded in the recorder's office of St. Louis county, and is hereto annexed and made a part of this agreement. The defendant agrees to the foregoing statement under the express reservation and condition that he may take every exception allowed by the law to plaintiff's motion as being out of time or otherwise improper, or that the facts as stated are incompetent as evidence or irrelevant."

The court overruled the motion and refused to set aside or vacate the sheriff's returns on the executions, and refused to allow other executions to issue against the defendant except for the balances of the judgments uncollected.

Krum & Harding and *W. F. Wood*, for plaintiff in error.

I. The court erred in refusing to strike out the credits endorsed on the executions, and in refusing to issue alias

Magwire v. Marks.

executions for the whole amounts of the judgments discharged of the credits. (See *Adams v. Smith*, 5 Cowen, 280; 2 Harr. 299; 14 Ala. 541; 30 Maine, 187, 450; 22 Ala. 587; *Heath v. Daggett*, 21 Mo. 69.)

Field, for defendant in error, cited R. C. 1855, p. 484, § 46; *Hensley v. Baker*, 10 Mo. 157; *Garth v. McCampbell*, 10 Mo. 154; *Vattier v. Lytle*, 6 Ham. 477; *Perry v. Williams*, Dudley 44; *Curtis v. Bennett*, 11 Humph. 295.

NAPTON, Judge, delivered the opinion of the court.

The twentieth section of the eighth article of the act to regulate proceedings in justices' courts is an important modification of the law governing execution sales. Occurring, as it does, in the act which relates to justices' courts only, it may be presumed that it was only designed to apply to executions issuing from these inferior tribunals, yet its language is broad enough to include all kinds of executions; and it is not very apparent what motive could have induced the legislature to introduce the remedy therein provided in one class of executions more than in another. The doctrine of *caveat emptor* is not abolished by this section so far as purchasers at execution sales are concerned; but a consequence, which has been drawn from this doctrine, exempting execution debtors from all responsibility to purchasers at such sales when their title has failed, is distinctly repudiated. The principle might have been applied with great propriety to all executions, from whatever quarter they might emanate; and it seems to be the result of oversight or accident that the provision is found where it is, instead of in the act regulating executions generally. The case of *Heath v. Daggett*, 21 Mo. 69, is not reconcilable with a strict application of the maxim of *caveat emptor* to execution sales. The return of the sheriff was in that case not held to estop him from showing that the property levied on and sold was not in fact the property of the defendant in the execution; and therein the decision was totally at variance with the case of

Magwire v. Marks.

Curtis v. Bennett, 11 Humph. 295, which has been cited in behalf of the defendant in this case.

The facts of this case are, that the plaintiff has received no benefit from any thing which has been done under this execution, and the defendant has received no injury; that the plaintiff has obtained no money, and the defendant has lost none; that both parties are in *statu quo* before the levy. To hold that the plaintiff is estopped from showing this because of the return of the sheriff, which shows the collection of nearly all the money called for by the execution, can only be justified by regarding the plaintiff as bound by the levy and sales which he ordered, however fruitless their results might prove. This would have the appearance of inflicting a penalty upon him for taking a course which he is expressly authorized to take by the statute, and for the consequences of which to others he has become responsible under the provisions of the statute by giving ample bond and security. These consequences the plaintiff has already submitted to in the shape of damages recovered in another suit; and to add to them the loss of his claim against the defendant in the execution, not one cent of which has been paid, would certainly be a harsh construction of the law. Undoubtedly the rule of *caveat emptor* is the settled rule in this state so far as purchasers under execution are concerned; and if the rule, by its implication, necessarily embraces the defendant in the execution, the plaintiff and the sheriff—as was held in the cases of *Valter v. Lytle's Adm'r*, 6 Hamm. 482, and *Perry v. Williams, Dudley*, 46—the application of *Magwire* to have the return corrected could not be granted. But the section of the statute to which we have referred shows the intention of the legislature not to extend the operation of this principle to the defendant in the execution, and, taken in connection with the decision in *Heath v. Daggett*, seems to warrant the conclusion to which with some hesitation we have arrived in the face of respectable authorities to the contrary. We shall permit the sheriff's return to be amended.

The judgment is reversed and the cause remanded; the other judges concur.

HUNT, Respondent, v. COBB, Appellant.

1. In summary proceedings under the landlord and tenant act of November 29, 1855, the summons issued by the justice and directed to the tenant must be executed at least five days before the return day thereof. (R. C. 1855, p. 1017, § 34.)
2. Should a justice of the peace in such a summary proceeding, in which less than five days' service of the summons has been had before the return day of the writ, render judgment of default against the defendant, and he should appeal, and should fail to prosecute his appeal with effect, the appellee would not be entitled to have the judgment affirmed by the appellate court upon his filing a transcript of the proceedings of the justice. (SCOTT, Judge, dissenting.)

Appeal from St. Louis Land Court.

Cobb, for appellant.

Comfort & Manter, for respondent.

RICHARDSON, Judge, delivered the opinion of the court.

The plaintiff commenced proceedings before a justice of the peace on the 8th of July, 1856, under the landlord and tenant act, to recover the possession of a tenement alleged to have been in the possession of the defendant. The summons was issued on the 8th, served on the 12th, and was returnable on the 15th of July, 1856. On the return day, judgment by default was rendered against the defendant, and after an unsuccessful motion, made in proper time, to set it aside, he appealed to the land court. It appears from the record that at the October term of the land court the plaintiff filed a transcript of the appeal, and on her motion the judgment of the justice was affirmed, which the court subsequently refused to set aside.

The justice evidently proceeded on the idea that the local act of 1845 concerning landlords and tenants (R. C. 1845, p. 1101, Appendix) was still in force, though it had been superseded by the act of 1855, which took effect the 1st of May, 1856. The act of 1845 required that the summons should be made returnable within three days, and should be

served *two days* before its return; but the new law made a material change in that respect, and provides that the summons shall be executed *at least five days* before the return thereof. (R. C. 1855, p. 1017, § 34.) The law, then, in force required that the summons should be served at least five instead of two days before the return day; and according to the principle decided in *Williams v. Bower*, 26 Mo. 601, the writ was void, and the justice did not acquire any jurisdiction of the person of the defendant to authorize the judgment. As the judgment was void, the land court ought not to have affirmed it, and it will therefore be reversed and the cause dismissed.; Judge Napton concurs.

SCOTT, Judge, dissenting. The process issued in this case was erroneous, and the suit should have been dismissed by the justice. He refusing to do this, the defendant had a right to appeal, but not having complied with the terms on which the appeal was allowed by law, the judgment of the justice was affirmed. This was under the act to promote the payment of jurors in St. Louis county. (Sess. Acts, 1847, p. 68.) The case of *Harrison v. Steamboat Cumberland Valley*, 13 Mo. 227, sanctions the course pursued in this case. This case has been subsequently followed, holding however that it does not apply to appeals from the law commissioner's court.

The judgment should, in my opinion, have been affirmed.

HAMILTON, Respondent, v. WRIGHT'S ADMINISTRATOR, Respondent.

1. The word "lease" as an operative word in an instrument of lease imports and contains a covenant for quiet enjoyment as well as the words "grant and demise." (SCOTT, Judge, dissenting.)
2. Such implied covenant runs with the land.
3. A., a tenant for life only of certain real estate but possessed of a full power to dispose thereof by appointment by will, leased the same to B. for a term of ten years. A. died before the expiration of said term without having

Hamilton v. Wright's Adm'r.

attempted to protect the tenant by exercising the power of appointment, and the tenant was evicted by the remainder man. *Held*, that B. might maintain an action against A.'s administrator to recover damages for a breach of the covenant implied from the word "lease" in the instrument of lease.

Appeal from St. Louis Land Court.

Demurrer to a petition. The petition is as follows: "The plaintiff states that one William F. Wright in his lifetime, by an indenture made between him of the one part, and Peter Difley of the other part, dated the 27th day of April, 1852, the said William F. Wright did lease unto the said Peter Difley a certain lot of ground and premises therein more particularly mentioned and described, situate in the city and county of St. Louis, in the state of Missouri, for the term and at the rents and upon the covenants and stipulations therein particularly set forth, which said indenture, sealed with the seal of the said William F. Wright, the plaintiff now brings into court here, and which is in the words and figures following: 'Lease, made this 27th day of April, 1852, by and between William F. Wright, lessor, and Peter Difley, lessee. Said Wright hereby leases unto said Difley, upon the conditions, covenants and for the rents heretofore named, a lot of ground [describing it] and being the same premises heretofore leased to said Difley: To have and to hold for a term of ten years from and after the 1st of January, 1853, at an annual rent of six hundred dollars, payable monthly, &c. And said Difley hereby covenants as follows: 1st, that said rent shall be punctually paid as due; 2d, that said Difley shall, within a reasonable time after the date hereof, add one story more upon the two houses upon said lot, with suitable back buildings, and make said improvement in a permanent and suitable manner, and keep and maintain all the improvements on said lot in good order and repair, and so deliver them to the lessor or his legal representatives at the end of said term by limitation or forfeiture; 3d, that the improvements shall be insured and kept insured, &c. This lease is made upon condition that if said rent or

Hamilton v. Wright's Adm'r.

any instalment thereof shall be allowed to remain due for thirty days after the same is payable, or if any of the covenants aforesaid shall not be complied with within a reasonable time, then this lease shall be forfeited and void. It is understood that all the repairs, additions and improvements on said lot and on the buildings thereon are to be at the sole cost of said lessee, and said lessor shall not be in any way chargeable for said premises. This lease is given in lieu of and is accepted for the renewed lease for five years from the 1st of January, 1853, stipulated for in the indenture of lease dated 22d of November, 1847, and under which said Difley holds said premises up to the beginning of the term aforesaid. The lessor is to pay the state, city and county taxes. It is also understood that this lease is assignable at the option of said Difley or legal representatives. It is understood that the lessor shall have the right to designate the insurance company in which said premises shall be insured, and may from time to time, as said lessor may elect, change the risk from one office to another, &c. In witness whereof, &c. And the plaintiff further states that the said Peter Difley on the 18th of October, 1852, by deed of that date, together with his wife, for the consideration of \$1,300 cash in hand paid them by the plaintiff, did assign, transfer and set over unto the plaintiff the said indenture of lease, together with all their right, title and interest, claim, property and demand of, in and to the said premises so as aforesaid leased, which they then had either by means of said lease or otherwise howsoever, by virtue of which said assignment the plaintiff on the same day last aforesaid entered upon the said premises and became possessed thereof, and was entitled to have and keep possession of the same upon the 1st of January, 1863; that he and those under whom he claims have punctually paid the rents reserved in the said lease and performed all the covenants on their part to be kept and performed, and that he had been, from the time of said assignment to him up to the time of taking of the possession of the premises by the curator of William F. Wright, as hereinafter mentioned,

Hamilton v. Wright's Adm'r.

in the receipt of large sums of money over and above the rents thereon and the cost and expenses of insurance. And the plaintiff further states that the said William F. Wright departed this life some time in or about the 9th of May, 1856, intestate, leaving as his only son and heir William T. Wright, who is under the age of twenty-one years, and for whom the said James T. Sweringen has been duly appointed curator, the said Sweringen, defendant, having also been duly appointed by the St. Louis probate court administrator of the estate of the said William F. Wright, deceased. And the plaintiff further states that before and at the time of making the said indenture and from thence until at the time of the death of the said William F. Wright, he, the said Wright, had not a good right or title, or full or lawful power or authority to lease the said premises for the said term of ten years in the manner above set forth, or for any period beyond the term of his life, (notwithstanding he had full power and authority under the deed from Mary Ann Wright, hereinafter mentioned, by his last will and testament, to direct the trustees in the said deed named to hold or convey the said property subject to the said lease, or otherwise dispose of the same in such manner as to render valid and effectual as against all persons whomsoever the said term or the residue thereof,) the only title or right or power which the said William F. Wright at any time ever had in, to or over the said property being derived under a certain deed from Mrs. Mary Ann Wright to M. Lewis Clark, Samuel B. Churchill, and David D. Mitchell, dated November 19, 1844, by which said deed the premises were held by the said parties in trust to and for the said William F. Wright during his natural life, and after his decease to be conveyed and disposed of by the said trustee as he, the said William F. Wright, should by last will and testament appoint, (but by no other appointment,) and in default of such appointment to and for the lawful heirs of his body, as by said deed, reference being thereunto had, may more fully and at large be seen. And the plaintiff further saith that the said William F. Wright

having so as aforesaid died intestate and without having made such an appointment, the said term ended and was determined upon his decease; and thereupon, under and by virtue of the said deed from the said Mary Ann Wright, the said William T. Wright, as heir of the said William F., became and was entitled to the fee simple of the premises so as aforesaid leased and to the immediate possession thereof; and the said William T. Wright having such lawful right and title to enter into and upon the said premises and take, possess and enjoy the same and evict the plaintiff therefrom, whilst he, the plaintiff, was in the possession of the premises, that is to say, on or about the 26th day of June, 1856, by James T. Sweringen, as curator of and acting therein in behalf of said William T. Wright, lawfully entered into and upon the said premises and thereof evicted the plaintiff (under and by virtue of the right and title so as aforesaid acquired by the said William T. under the said deed from the said Mary Ann Wright) and still lawfully holds the plaintiff out of the same. By reason of which said several premises the plaintiff not only lost and was deprived of the use, benefit and enjoyment of the said premises for the residue of the said term, but also lost the value of the improvements or additions put upon the said premises by the said Peter Difley in conformity with his said covenant in that behalf (which value the plaintiff believes to be about \$1,000). To the damage of the plaintiff three thousand dollars, for which he asks judgment."

The defendant demurred to this petition. The court sustained the demurrer.

Shepley, for appellant.

I. The law implies a covenant as well for title as for quiet enjoyment from any words of leasing. (Rawle on Cov. 473-4 and notes; 1 Furlong on Landlord and Tenant, 456; 4 Jarman, Conveyancing, 390; Addison on Contracts, 50, 61; 5 B. & C. 589; Coote, Land. & Ten. 215; Maeder v. City of Carondelet, 26 Mo. 112; Maul v. Ashmead, 20 Penn.

Hamilton v. Wright's Adm'r.

482; Black v. Gilmore, 9 Leigh, 448; Dexter v. Mauley, 4 Cush. 14.) The only case opposed to this view is Levering v. Levering, 13 N. H. 517. See Rawle on Cov. 473, notes.)

II. The covenant, in both its branches, runs with the land. (Rawle on Cov. 343, 380; Dickson v. Desiré's Adm'r, 23 Mo. 151; Chambers' Adm'r v. Smith's Adm'r, 23 Mo. 174.)

III. The defendant as administrator of William F. Wright is liable upon the implied covenant. The doctrine supposed to have been established in Swan v. Scarles, Dyer, 257, and Adams v. Giboney, 6 Bing. 656, is repugnant alike to common sense and common justice, violates the plainest rules for the construction of instruments, and is utterly at variance with an intelligent theory which furnishes any covenant at all. This case is however entirely without the rule of those above mentioned, as well because the lessor had it in his power to maintain the tenant in his estate, (and it is only to suppose him an honest man to infer that he intended to do so,) as the clear intention of the parties deducible from the subject matter and terms of the lease, and the court will not extend the doctrine to cases not within the reasons upon which it is based. (See generally Swan v. Scarles, Dyer, 257; 6 Bing. 656; Shep. Touch. 160; Cro. Eliz. 157, 553; 1 Brownl. & Gol. 22; Com. Dig. Covenant C.; 2 Williams on Ex'rs, 1490; Vimer, Abr. Covenant D. & E.; Rolle, Rep. 82; Hobart, 12; 9 Jarm. on Conv. 371; 7 Scott, 60; 1 Nev. & Per. 663; 2 Chitty, 646; Styl. 407; Gilb. Cov. 327; 6 Scott, 447; Co. Litt. 389, *a*; 1 C. B. 427; 4 Jarman on Conv. 391; Owen, 105; 3 C. B. 194; 9 Leigh, 446; Williams on Real Property, 112; Woodfall on Land. & Ten. 91; 6 Upper Can. R. 303; 3 Kern. 156; Smith on Land. & Ten. 262.)

F. A. Dick, for respondent.

I. The petition is defective. The lease is a mere transfer of the lessor's right to the possession of the premises for ten years in consideration of the lessee's covenants. It contains no express covenants. The law will not imply a covenant by

the lessor that he had power to lease for ten years, when the estate held by him is repugnant to such intention. (6 Bing. 656.) The words "grant" and "demise," when used in a lease, are the only words which imply covenants for title. (6 Cruise Dig. s. p. 369; Shep. Touch. 160, 167; Wheat. Selw. 461; 8 Cow. 36, 40; Adams v. Gibney, 6 Bing. 656; 5 Bing., N. C., 185; 9 New Hamp. 219; 13 N. H. 513; 11 Mo. 442; 9 Ves. 330; 2 Caines, 194; 4 Wend. 502.) Even where there are implied covenants in a lease for years, the covenants cease with the estate of the lessor. (6 Bing. 656; 1 C. B. 431.) The plaintiff has no cause of action against the decedent's estate for the reason that there was no cause of action against him during his life. None but an express covenant could make the administrator liable, where the decedent was not and could not be liable during his life. (6 Bing. 656; 1 C. B. 402.) The plaintiff does not allege in his petition any covenant made by Wright nor any covenant broken by him. The plaintiff does not allege an eviction by the persons shown by the petition to have been entitled to the possession, the trustees. The possession taken by the curator was not accompanied by any legal right.

RICHARDSON, Judge, delivered the opinion of the court.

The words relied upon in this case as creating a covenant for quiet enjoyment are these: "The said Wright hereby *leases* unto said Difley," &c. It is almost an axiom in the law that the words "*demisi*," "*concessi*," or demise and grant, in a lease for years contain an implied covenant for quiet enjoyment and that the lessor had power to demise; but it is insisted that no other words have that technical operation. In many of the early cases, which discuss the force of particular words on this subject, the leases were in Latin, and, as the words "*demisi*" or "*concessi*" were always employed, it was only necessary to decide on the effect of these words; and as in England leases are drawn by professional conveyancers, who use established forms or follow stereotyped phrases that contain the words "grant" and "demise," their courts have

Hamilton v. Wright's Adm'r.

not been called on to decide whether other equivalent words would not have the same force and imply the same covenants. Whilst therefore the adjudged cases assume or decide that the use of the word "demise" of itself implies a covenant, it can not be inferred that no other translation of "*demisi*" has the same operation. The case of *Levering v. Levering*, 13 N. H. 517, is the only case we have seen, which denies that such an effect can be implied from the words "*let and lease*," and the reasoning of the court is founded solely on the absence of these words in the older cases. But Rawle, in his learned treatise on covenants for title, properly observes that the only difference would seem to be that they used the Latin word "*demisi*," of which he thinks "*lease*" is a fair translation; and the law now seems to be that the implied covenants arise, not from particular or fixed terms, but from the words of leasing, or, as Furlong expresses it, "from the use of words of demise in a lease." (Furlong on Land. & Ten. 456; *Maule v. Ashmead*, 20 Pa. 482; *Young v. Hargrave's Adm'r*, 7 Ohio, (Pt. 2) 63; *Black v. Gilmore*, 9 Leigh, 448.) The lessor must have intended that the lease should be beneficial to the lessee, and the latter had the right to require of his landlord that the quiet enjoyment of it should be secured to him against eviction or disturbance by his act or the act of those who claim under or paramount to him. (Smith, Land. & Ten. 262, 268.) We think, then, that the lease in this case contained a covenant for quiet enjoyment implied by law, which ran with the land, and for the breach of which an action accrued to the assignee of the term.

The next question is whether the administrator of Wright is liable upon the implied covenant. It is said that as the lessor was only a tenant for life, the covenant was limited to the estate which he could lawfully grant, and that it ceased at his death because there was no longer an estate to support it. The two cases of *Swan v. Scarles*, Dyer, 257, and *Adams v. Gibney*, 6 Bing. 656, decide that if a person having only an estate for life makes a lease for years, which contains the covenants implied from the use of certain words, and,

after his death, but before the expiration of the term, the lessee is evicted by the remainder man, an action will not lie against the personal representative of the lessor, because "the covenant in law ends and determines with the estate and interest of the lessor." Conceding, however, to these cases the full weight of authority claimed for them, although they have been doubted, they do not govern or apply to the case under consideration, because it is clearly distinguishable from them. The principle on which they are founded seems to be that it will only be supposed that a party covenanted for what he could lawfully grant, and that the thing covenanted is within his power, or, as remarked in *Bragg v. Wiseman*, Brownl. 23, "that a covenant in law shall not be extended to make one do more than he can, which was to warrant it as long as he lived and no longer." But by the deed which vested in Wright an estate for life with the power of appointing by last will, the disposition of the property after his death was expressly conferred, so that he had the right and full power to make good the lease during the whole term, and to protect his lessee against any intrusion by the remainder man as effectually as if he had possessed an absolute estate in fee simple. The act necessary to secure the tenant in the full enjoyment of the leasehold for the full term of ten years was within his power, and as it was by his default that the lessee was injured, indemnity ought to be made by his personal representative. It is said by Judge Williams, in his notes to the case of *Holder v. Taylor*, Hobart, 47, that if in such case the lease had been made by a tenant in tail, his executor would be liable; upon the principle, we suppose, that the tenant in tail can effectually dock the entail by a common recovery, and in this respect the analogy is perfect.

It may often happen that the application of the rule in *Swan v. Scarles* will work no injury; for as the lessor is released from his covenants, the lessee will be discharged from the further payment of rent; but in this case the lessee was required not only to pay rent and all taxes and to keep the building insured, but to make lasting and valuable improve-

ments, which were to remain on the land to enhance the value of the estate, and under such circumstances it would be a fraud on him to terminate the lease without compensation, and to sacrifice the improvements he had made. The principles involved in this case are treated in the text and elaborate notes of Rawle on Covenants (p. 472, 480; and we have thought it only necessary to state our conclusions, without reviewing the authorities which have been industriously collected and ably discussed by the counsel representing the parties in the cause.

In our opinion the demurrer was improperly sustained, and the judgment therefore will be reversed and the cause remanded. Judge Napton concurs.

SCOTT, Judge, dissenting. I consider that the word " demise" or "grant" as alone being capable of raising an implied covenant on the part of a landlord in a lease. This I regard as the settled law, and do not feel myself at liberty to depart from it from any notions of justice or equity I may entertain in relation to the contrary opinion. It is the province of the courts to declare, not to make the law. It seems to me that a principle so well settled can not be overturned but by an act of the legislature. Many persons may have been advised and have drawn their leases in conformity to the law as it was understood to be, and now to change it would be to subject them to damages contrary to good faith and the understanding of the parties. The idea of making particular words, and them alone, imply a covenant, is not a novel one. Indeed it has long been found in our code. The words "grant, bargain and sell," by our statute create certain covenants. What would be thought of such a construction of the statute as would make any equivalent with raise the same covenants? By a parity of reason, why should they not do it? When the common law among us is fixed and settled, courts have no more authority to disregard it than they have to disregard the statute law. If the common law declares that a particular word is necessary to

imply a covenant, courts can no more say that an equivalent word shall have such an effect than they can hold that a word equivalent in import to a statutory word, which is made to create a covenant, shall have the force of the statutory word. The reasoning of the case of *Frost v. Raymond*, 2 Caines, 188, is strong in corroboration of the views here presented. It was there held that the words "grant, bargain, sell, alien and confirm," in a conveyance in fee, do not imply a covenant; that it was implied by the word "*dedi*" or "give." Chan. Kent observed, "I am not able to assign a very solid reason for this distinction between the force and effect of the words 'give' and 'grant.' It arose from artificial reasons derived from the feudal law. The distinction has now become merely technical, but it is sufficient that it clearly exists and we are not certainly at liberty to confound the words or change their established operation. It is our duty to acquiesce in the law as we find it."

The reversal of this judgment will in my opinion involve the violation of another principle of law as well established as any that prevails. To it there is no qualification or exception to be found in the books so far as I have been able to find. The principle is this, that an implied covenant determines with the interest of the party out of whose estate it arises. Hence if a party take a lease for a certain term under an impression that the lessor is tenant in fee when in fact he is only tenant for life, the right of suing on that covenant will be defeated by the lessor's death, and the lessee left without remedy on eviction by the remainder man. Here the lessor or covenantor had an estate for life; he is dead, and, even if there was an implied covenant, as the estate to which the covenant was annexed is determined, no action can be maintained against the lessor's representatives. The authorities on this point all concur, and come down in an unbroken series from the earliest times to the present day. (*Swan v. Stranham or Scarles*, 3 Dyer, 257; *Adams v. Gibney*, 6 Bing. 156, 666.) I can not perceive how the principle can be affected by the fact that Christy, by a power of

Patterson & Wife v. McCamant.

appointment, with which he was clothed, might have converted his life estate into a fee simple. He was under no obligation by contract to exercise that power; and how can his failure to do an act which he was not bound to do affect his rights? In every case where the landlord fails to give a covenant for quiet enjoyment, he has it in his power to make good to the tenant any loss he may sustain by reason of his not having such a covenant. But will this ability affect his rights or change the nature of the liability he has incurred by reason of his contract? I am aware of no principle by which such a result can be produced.

I am in favor of affirming the judgment.



PATTERSON & WIFE, Defendants in Error, v. McCAMANT,
Plaintiff in Error. *

1. A bill of peace to restrain a person from instituting ejectment suits against another, on the ground that such suits would be vexatious, can not be maintained unless the title to the land in dispute has been fully and satisfactorily litigated at law; the institution of repeated ejectment suits, if the same are abandoned before trial, can not furnish a foundation for the maintenance of a bill of peace to restrain vexatious litigation.

Error to St. Louis Land Court.

The facts sufficiently appear in the opinion of the court.

Cates and Casselberry, for plaintiff in error.

Glover and H. M. Jones, for defendants in error.

NAPTON, Judge, delivered the opinion of the court.

We have not been able to perceive any principle upon which the decree in this case can stand. The principle asserted in the bill and carried out by the decree is, that a court of equity will interpose its authority by perpetual in-

* RICHARDSON, Judge, having been of counsel, did not sit at the hearing of this cause.—[REP.]

junction in favor of a person in possession of land, whose title is threatened by another person holding a worthless claim to the same land, where the person holding the adverse title is insolvent, and he has already brought two suits in ejectments and caused them to be dismissed or taken nonsuits. These were the material facts upon which the decree was based.

The case is supposed to fall within a class of equitable proceedings termed bills of peace, but the petition will be found to lack the essential elements of such bills. There are two kinds of bills of peace, and only two kinds. The first is, where courts of equity, upon the sole ground of preventing multiplicity of suits, will try a title or have it tried upon proper issues, because there is a number of persons interested in it, and a great many actions at law would be necessary to conclude the title. Suits concerning fisheries, parochial tithes, &c., are of this kind and fall within this class. Another class of cases is where the title has been fully and satisfactorily litigated at law. It put a stop to vexatious suits, which courts of law can not do; equity will interpose by injunction.

In this case, there is but a single claimant and a single party in possession, and it is not asserted in the bill nor found by the court that any trial at law has ever been had. It is not perceived how the alleged fact of insolvency can give any additional claim to an interposition by injunction. If the title is worthless and the holder of it insolvent, the latter circumstance would not seem to give it any additional importance as a means of annoyance. The right which a party plaintiff has in all actions to take a nonsuit, although its exercise may, in ejectment as well as other forms of action, occasion annoyance and protract litigation, is not believed to be a sufficient cause of itself to warrant a court of equity to interpose its power of injunction. The statute has prescribed a limit within which actions must be brought; but so long as a party keeps within that limit, his right to sue and to abandon his suit as often as he pleases, can not be

questioned. As he has to pay the costs of such dismissal or nonsuits, that circumstance will, it is presumed, in most cases, furnish a sufficient protection to his adversary against abuses of the power. The bill, answer, evidence and finding of the court will show this case to partake more of the nature of an action of ejectment than a bill in equity, since the title on both sides was investigated and determined. No authority has been found to justify a court of equity in trying the merits of adverse titles upon a bill of peace, unless under the circumstances we have heretofore stated.

The case of *Welby v. The Duke of Rutland* is a satisfactory authority on this point. In that case Welby and the Duke of Rutland claimed the same manor, and the Duke had appointed a game-keeper and had the appointment registered. The plaintiff Welby asserted that the Duke had no title of any validity whatever, and that his claim was a cloud upon his title and was a serious obstruction to a sale or other disposition of his estate, and the bill asked for a perpetual injunction against the Duke, if upon proper issues the title was found as asserted to be of no validity. The Lord Chancellor Ashley dismissed the bill and his decree was affirmed in the house of lords. It is declared to be the uniform and well established practice of courts of equity to dismiss such bills, and that it is not their province to try legal titles or enjoin an asserted one until it had been tried at law. (2 Bro. P. C. 42.) In *Devonsher v. Newenham*, 2 Sch. & Le. 204, Lord Redesdale was very clear upon the same point. That was a case where devisees under a will brought a bill against persons claiming a title paramount to the will and calling on them to litigate their claims with the devisees. Lord Redesdale said, "No such suit has ever been entertained, so far as I can find, and it would be most dangerous to give the example of entertaining such a suit." He explains the cases where equity may interpose: "If there is an assertion of title by a suit at law, in which the party fails, but yet asserts it frequently in the same manner, such an assertion becomes oppressive to the opposite party, and as it may

be made by ejectment—a proceeding which may be repeated forever, (and which is not as now any part of the old law)—courts of equity may interfere to prevent such an oppressive proceeding, which overturns the principle of the ancient law, calculated to prevent perpetual litigation. It is on this ground courts of equity have interfered by bills of peace.”

The same eminent judge repeats his explanation of bills of peace in his *Treatise on Equity Jurisprudence*: “Such a bill,” says that work, “can scarcely be sustained where a right is disputed between two persons only, until the right has been tried and decided upon at law.” (Mitford Eq. Pl. 44.) The cases of the Mayor of Pilkington, 1 Atk. 530; *Bush v. Western*, Prec. in Eq. 530, and *Donel v. Girdle*, Prec. in Eq. —, confirm this view of the subject. Judge Story, in his *Treatise on Equity*, also entertains the same opinion with Lord Redesdale, and quotes with approbation from his treatise. Judge Story says that, “in order to entitle a party to maintain a bill of peace, it must be clear that there is a right claimed which affects many persons;” that if the right be disputed between two persons only, the bill will be dismissed; and, in relation to the cases where an interference is asked to prevent vexatious litigation after repeated trials at law, he says: “Courts of equity will not interfere in such cases before a trial at law, nor until the right has been satisfactorily established at law. But if the right is satisfactorily established, it is not material what number of trials have taken place, whether two only or more. (2 Story on Eq. § 859.)

There is a class of cases in which courts of equity interpose by injunction to prevent irreparable mischief, and another class where the assistance of that court is invoked to have conveyances made to defraud creditors set aside; but it is obvious that the bill in this case was not framed so as to fall within either of those conceded branches of equity jurisprudence.

The judgment is reversed; Judge Scott concurs. Judge Richardson not sitting.

McAllister v. Pennsylvania Insurance Co.

MCALLISTER, Appellant, v. PENNSYLVANIA INSURANCE COMPANY OF PITTSBURGH (GARNISHEE), Respondent.

MCALLISTER, Appellant, v. COMMONWEALTH INSURANCE COMPANY OF HARRISBURGH (GARNISHEE), Respondent.

1. Foreign incorporated insurance companies, which have established agencies within this state, and whose agents have complied with the provisions of the act licensing and regulating agencies of foreign insurance companies (R. C. 1855, p. 884), are subject to garnishment process.
2. Service of garnishment process may be had in such case upon the authorized agent of the foreign insurance company, he being a chief or managing officer thereof within the meaning of the twenty-sixth section of the first article of the attachment act.

Appeal from St. Louis Court of Common Pleas.

Roger C. McAllister, having recovered judgment against one Beasley, caused execution to issue thereon. The sheriff made the following return of this execution: "I did, by order of the plaintiff Roger C. McAllister, October 20, 1857, summon the Pennsylvania Insurance Company of Pittsburgh and the Commonwealth Insurance Company of Harrisburgh, Pennsylvania, and by delivering to George K. Budd, agent of each of said insurance companies, a written copy of the garnishment; further, by summoning said insurance companies to appear at the return term of this writ to answer the interrogatories that may be exhibited by the plaintiff touching their indebtedness to the defendant Benjamin F. Beasley; and I further declared to said Budd that I did attach in the hands of said insurance companies (and summon them as garnishees) any goods, chattels, moneys or evidences of debt which said insurance companies may have belonging to said defendant; and further, that I did attach in said insurance companies' hands all debts due from them to said defendant, or so much thereof as shall be sufficient to satisfy the debt, interest and costs in this case."

Both of the companies mentioned in the return of the sheriff

McAllister v. Pennsylvania Insurance Co.

filed separate motions praying the court to set aside the return of the sheriff and to discharge them from answering the interrogatories, on the ground that it did not appear by said return that any legal service of the notice of garnishment was made by said sheriff, or that the companies had been legally subjected to the jurisdiction of the court.

The court sustained the motions.

Hart, Thomas & Sharp, for appellant.

Drake, for respondents.

I. The sheriff's return is not sufficient to give the court jurisdiction. (See *Thatcher v. Powell*, 6 Wheat. 119; *United States v. Arredondo*, 6 Peters, 709.) The return can not serve as the foundation of any proceeding against the garnishees. It shows nothing more than that two companies styled therein insurance companies were garnished by serving notice of garnishment on an individual whom the sheriff styles their agent. This is no mode of summoning a garnishee known to the law of this state. If the companies are incorporated, service is required to be by delivering the notice of garnishment to the "president, secretary, treasurer, cashier, or other chief or managing officer of the corporation." (R. C. 1855, p. 246, § 26.) If unincorporated, they can not be summoned as associated bodies by notice to their agent or any of their officers. If they do business through an agency established under the "act to license and regulate agencies of foreign insurance companies," the difficulty of holding them as garnishees is only increased. The record does not show the *situs* of the companies and the court can not presume it. It does not show that they are doing an insurance business in this state through an agency established under said act; nor that the person on whom notice was served was the agent for the transaction of that kind of business under said act. Besides, there is no law of this state authorizing notice of garnishment to be served upon a foreign insurance company by delivery to its agent. If the foreign insurance company can be garnished at all in the courts

McAllister v. Pennsylvania Insurance Co.

of this state, it must be when the company is a corporation, and then the service must, as in the case of a domestic corporation, be served upon some one of the officers mentioned in the section above cited. Even if there were such a law, it could have [no] force to require foreign corporations to answer as garnishees in our courts. (3 Metc. 564; 1 Gray, 424; 33 New Hamp. 337.)

NAPTON, Judge, delivered the opinion of the court.

These cases involve the same questions. The return of the sheriff to writs of executions against one Beasley stated that by order of the plaintiff in said executions he had summoned the two insurance companies named, by delivering to George K. Budd, their agent, a written copy of the garnishment, &c. The two companies denied their liability to answer such a process thus served and returned, and of this opinion was the court of common pleas and they were consequently discharged. The judgment of the court must have proceeded either on the ground that foreign insurance companies, under our laws, are not subject to garnishment, or that the service of the writ in these particular cases was insufficient and illegal.

The seventh section of the execution law provides that "no corporation, officer or person exempted from garnishment by the act to provide for suits by attachment shall be summoned as garnishees under the provisions of this law." The twenty-seventh section of the attachment law specifies the officers and corporations which are exempted from this process, and the present garnishees are certainly not included within the exceptions. The twenty-fifth section of the same embraces, as liable to the process, "all persons who are named in the writ, and such others as the officer shall find in the possession of goods, money or effects of the defendant not actually seized by the officer, and also such as the plaintiff or his attorney shall direct." The twenty-sixth section says that "notice of garnishment shall be served on a corporation in writing, by delivering such notice or a copy thereof to the

president, secretary, treasurer, cashier, or other chief or managing officer of such corporation."

When it is considered that the attachment law treats a foreign corporation, having its chief place of business within this state, upon the same footing with domestic corporations and protected from that extraordinary and summary process in the same cases in which our own corporation would be; when, in connection with this, we see the act of December 5, 1855, concerning agencies of foreign insurance companies, recognizing them, when established in conformity to the directions of that law, to all intents as domestic corporations, it would seem to be a reasonable interpretation of the language of the twenty-sixth section of the attachment law that an agent of a foreign insurance company located here and doing business under this law of 1855, should be deemed a "*managing officer*" of such corporation for all the purposes of an attachment or garnishment. Such agents do in fact represent the corporation here, although, in the foreign country where the corporation has been chartered and its chief place of business is, there is another chief officer of such corporation.

We are not aware of any principle of public policy which could induce the legislature designedly to discriminate between domestic insurance companies and these agencies of foreign insurance companies, which they have allowed to transact business here with all the privileges of domestic corporations, so as to exempt the latter from liability to a process to which the former is undoubtedly liable. There is no more inconvenience in requiring a debt, confessedly due, to be paid over to a creditor of their creditor in the one case than in the other; and it could only be by some oversight in the law-makers if any such discrimination had been left in the statutes. But we consider the language of the twenty-sixth section sufficiently comprehensive to cover all cases, the agents of foreign insurance companies as well as the chief officers of those chartered and located here.

The return of the sheriff was, in our opinion, *prima facie*

sufficient. If the Pennsylvania Insurance Company of Pittsburgh is not a corporation, and not a foreign corporation as its name alone would indicate; if George K. Budd is not their authorized agent, as the sheriff certifies he professes to be; if they have not complied with the provisions of the act of December 8, 1855, and have no authority or right to transact business of this kind here, these are matters within their knowledge and may be set up in the answer if denied. How far such a defence would be available is another matter, not important to be decided here. We will presume they have done their duty and complied with the law until the contrary appears.

Judge Scott concurring, the judgment is reversed and the cause remanded.



THE STATE, Respondent, v. LAMB, Appellant.

1. To render a voluntary confession, made by an accused person before a committing magistrate and reduced to writing by the latter, admissible in evidence on the trial, it is not necessary that the record of the proceedings of the magistrate should show specifically that the prisoner was distinctly informed of the charge made against him and that he was at liberty to refuse to answer any question put to him, and that a reasonable time was allowed the prisoner to advise with his counsel and for that purpose to send for counsel; it is sufficient if it be shown upon the trial, by the testimony of the committing magistrate, that the requirements of the statute in this regard had been complied with.
2. A judicial confession is sufficient to found a capital conviction upon, although uncorroborated by any independent proof of the *corpus delicti*.
3. An extra-judicial confession, with extrinsic circumstantial evidence satisfying the minds of a jury beyond a reasonable doubt that the crime charged has been committed, will warrant a conviction, although the dead body may not have been discovered and seen so that its existence and identity can be testified to by an eye-witness.

Appeal from St. Louis Criminal Court.

George H. Lamb was indicted for the murder of his wife Sarah S. Lamb by drowning her in the Mississippi river, in

State v. Lamb.

December, 1857. The evidence chiefly relied upon on the part of the State was the confession of Lamb voluntarily made by him before Rudolph Herkenrath, a justice of the peace, in the city of St. Louis, before whom he was taken for examination. The transcript of the docket of the justice, which, together with the confession of Lamb reduced to writing by the justice and signed by Lamb, and other papers, were delivered to the clerk of the criminal court, contained the following statement: "Defendant, with consent of the attorney for the State, waives an examination, and having been advised by the justice of his rights under the statute, makes a voluntary confession, filed herewith." The confession was as follows: "I was married to Sarah S. Stafford in the court-house at Quincy, Illinois, in November, 1856, by a justice of the peace. I was then a resident of Mendota, La Salle county, state of Illinois. I did not take my wife to Mendota with me. I left her with her father at Hamilton. I returned to Mendota. Last November, (1857,) I went to Hamilton to remove her from her father, to go to Memphis or some place south to spend the winter. My wife and I came to St. Louis, I think about the 28th of November, 1857. We got here about daylight in the morning, and took breakfast and dinner at King's Hotel. From there we went up to the Astor House on Franklin avenue, kept by Hermann Norp. My wife was unwell during the time we were at the Astor House. I had two physicians attending on her — Dr. Christopher and Dr. Washington. Her sickness was caused by my giving her poison, strychnine. I bought it on Broadway, in a drug store in this city. I bought it for the purpose of giving it to her. I think I gave the strychnine to her twice. My intention was to dispose of her in some way. I had in my mind to destroy her. Norp and his lady came in and showed a good deal of distress about it, and I sent then for a physician for fear they might suspect something. The physicians prescribed for her. I gave to her what the physicians prescribed for her. I think I did exactly. I may not have given it to her. She recovered from the effects of

the poison administered to her. She threw it up before I had given her the prescription of the physician. I think she did because she vomited. I think I gave her the poison about the 2d or 3d of December. She was confined to her bed some days. She set up only a little while at a time for about two weeks after. About the 17th of December, we left the Astor House; the sun might have been about two or three hours high yet. I told her I was going down the river to Carondelet. We left there in a baggage wagon. No body went in the wagon with us but the driver. We took a band-box with a bonnet in it with us. She was apparently perfectly willing to go with me. We went down to the lower ferry landing. I did not know the driver of the baggage wagon. I think he was a colored man. We got out at the ferry landing. She sat in a room there. There was a young man there. I asked him whether she might sit there. He said she might. I had told some boys to bring a skiff there for me. I paid them at that time six or seven dollars for the skiff. We remained there about a full hour before the boys brought the skiff. My wife left in the skiff about two minutes after the boys had come. We started on down the river. We stopped about fifty rods below the steamboats, near where the streets are built out in the river, to get a stone or weight. I told her I wanted the stone to put in the bottom of the boat to keep it more even. One of the boys brought me two stones. There were two boys; each one brought one. I did not go out of the skiff at all. My design was to use these stones to sink the body. I noticed an island or sand bar. I saw an island without trees on it on the Missouri side. The island must be above Carondelet. I noticed but one island. We proceeded about half way down the island, on the east side of the island, near the channel, where the steamboats run. It was getting considerably dark. It may have been from twenty to fifty rods. * * * It is rather on the Missouri side of the channel. The steamboats ran between us and the Illinois shore. I then put my hand right back of her neck and pushed her head under the water. I held her

State v. Lamb.

head about two minutes under the water. I then raised her head partly out. She was dead. Her death was caused by my holding her head under the water.* I then took the two shawls off and took the bonnet off, and took a string of twine and wrapped it around one of the stones and tied it, and then tied the twine around her neck. The string between her head and the stone was about four to six feet long. I then lifted the stone over the skiff and then let down the stone and the stone thus drew her right down. The stone may have weighed about ten or twelve pounds; was about eight inches long and four inches thick. I got the twine for the purpose of using it as I did. I got the stones to sink the body. After sinking the body I went right ashore. I got ashore on the sand-bar on the Missouri shore. I then shoved the skiff right out in the stream. It was a medium sized skiff, from thirteen to fourteen feet long. I can't tell whether the skiff was painted. I left the oars; there were three or four—two short ones and two of pretty good length. I left no stones in the skiff. There was a rope or a chain in the skiff. I halloed from the sand-bar about an hour until an old countryman, I think a Dutchman, came and crossed me over. It was getting dark when I threw her overboard. I designed drowning my wife when I left the Astor House with her. I felt dissatisfied and felt as if I could not live happily with her. That was my motive for drowning her. She had never said or done any thing to cause me to feel that way that I can think of. I could not say that I had any ill-

* On the morning preceding his execution, Mr. Lamb gave to the clergyman in attendance upon him the following account of the killing of his wife. He stated that when he left the Astor House he told his wife he was going to Carondelet, and that in order to reach that place it would be necessary to take a skiff and sail down the river; that he proceeded with her to the foot of Carr street, in the city of St. Louis, where, upon reaching the edge of the water, and in close proximity to the skiff, he threw her down and held her head under the water until she was dead; that it was day-light, about four and a half or five o'clock, P. M.; that he then placed her body in the skiff and rowed down the river; that at a point in the river just below Carondelet, he threw the body overboard, having first attached to it a cord with a stone attached.—[REP.]

feelings toward her or any of her relatives. I felt as if I could not go back with her as my wife amongst my relations and acquaintances, as I had married one who was not my equal. I came up to the city about nine o'clock that night. I lodged in a house on the east side of Broadway, between Cherry and Wash streets. There was a hat store a little above that got on fire before that time. I don't know the name of the house nor of the man who kept it. I left the city, I think, the next day after. I went then right to her parents. I took her baggage to them. I told them I had buried her in Memphis. I gave them the names of the physicians who attended on her. I don't recollect the names now. I told them this to cover it up in some way. I married again on the 30th of December, 1857, a girl by the name of Louisa Shortliff. She did not know that I had been previously married to Sarah Stafford. I married so soon after the death of my wife because she said she would not wait any longer. She did not know any thing of this. She was perfectly innocent. I had been keeping company with her along through the fall months. I can not bring in any other excuse for murdering my wife than for the purpose of marrying that other woman. My present wife was not in the family way before I married her. I had not had any intercourse with her before our marriage. My opinion is that the piece of French merino now produced is of the dress my wife had on when I drowned her. I have made a confession to Mr. Stafford that two men were in the skiff with me. I am sorry that I have said it. That was a false statement. This statement is a true one as near as I can tell it. I don't know why I told Mr. Stafford that two men were with me, unless it must have been the evil spirit in me that made me tell it. Two men knew of my design to murder my wife. I think they only knew it a few days before I did it. I told them all they knew. I asked one of them to assist me in the matter. He expressed his willingness to assist me out of friendship. He went down to the river alone on foot, not in a wagon. His name is Josiah Moyer. At that time he was boarding at the

State v. Lamb.

house where I lodged the night I came back. I paid him five dollars for assisting me. He knew my intention when I went to the river. He carried nothing to the river for me. We talked about his going down with me a little before we started. He went down because I wished him to. The other man's name, whom I had informed, was Joseph Sawyer. He was in Mendota when I left. I don't know where he is now. I told Mr. Moyer this; I think I said in these words that "every thing had gone under." Moyer was a small sized man, of about one hundred and thirty pounds, of a dark complexion, spare-faced man; I think black hair. He is a painter by trade. I don't know where he resides. He may be from twenty-five to thirty years old. They are the only two persons who knew of my design. I had said something about it to a man by the name of Thomas S. Beal. He left the city before it transpired. Sawyer is about five feet ten inches high. I may have told him things that I don't think of. Norp and family did not know any thing of it at all. My intention when I came here was and is to tell the plain truth. It will relieve my mind some at any rate. I have no hard feelings against the two men. As soon as I had sunk the body I left right away. I did not stay to notice if the body rose again. I let the stone down the length of the twine, and the stone drew it right down. There were two men in the skiff that took me from the bar on shore. They made their skiff fast there to something and then we went together towards town. I then stopped at a public house and took the omnibus. I saw Moyer standing on some boat when I left the ferry landing. I next saw him after that on Franklin avenue. I told him that every thing had gone under. I have not seen Moyer since I left this place. I paid Moyer the five dollars for assisting me in carrying the baggage from the Astor House to his lodging room. Moyer had no money to pay his board. His intention was then to give it back to me. He did not take it with the understanding to assist me for the five dollars. If there is any thing in this statement contradictory to any former statement, it is

not from any intention on my part to say what was not true. From the condition of my mind at this time it might not be a wonder that it would not agree with what I have stated before. I have endeavored to make a frank confession. I have once left the church. It is the transgression of my duties toward my God that has brought me here and brought this on me."

The circuit attorney, previous to offering the above confession in evidence, introduced Herkenrath, the justice before whom Lamb was taken for examination and before whom the confession was made, as a witness. He stated, in substance, that Lamb was duly informed of his rights; that the affidavit of Mr. Stafford, upon which he was arrested, was read to him; that he was distinctly informed of the charge made against him, and that he was at liberty to refuse to answer any question put to him; that he informed Lamb that he might send for and advise with counsel; that he declined doing so and stated that he wished to make a confession. The defendant, by his counsel, objected to the introduction of the confession and accompanying paper "on the ground that it could not be read as a judicial confession because not taken in due course of law, as the transcript shows on its face; nor as extra-judicial, because it purported to be an examination of the prisoner, had before a judicial tribunal, in which the defendant was a prisoner, by legal process, on a legal accusation." The court overruled the objection and admitted the confession in evidence.

Other testimony was introduced corroborating the truth of the statements made by Lamb in his confession. The date of his marriage to Miss Stafford, the circumstances under which that marriage took place, his mode of life previous to his starting professedly for Memphis with his wife; the fact that he came to St. Louis and went with his wife to Norp or Noble's to board; that while there he did send for beer for his wife; that on two several occasions his wife became very sick at Norp's or Noble's—being afflicted with convulsions in some form; that Drs. Christopher and Washington were

successively called in to prescribe for Mrs. Lamb; that though they did not suspect the administering of poison to her, yet some of her symptoms were such as might possibly have resulted from strychnine; the fact that he came to Noble's on the 28th of November and left, professedly on his way to Memphis, on the 17th of December, 1857, in a baggage wagon, as stated in the confession, about three o'clock in the afternoon; that he came back and at about nine o'clock in the evening engaged lodgings at the place on Broadway mentioned in the confession; that the next day he left the city and went to Mr. Stafford's and stated that his wife had died at Memphis; that he married Miss Shortliff immediately; all these facts were proven by evidence outside the confession.

The court, of its own motion, charged the jury as follows: "1. If the jury believe from the evidence that the defendant, at St. Louis county and previous to the finding of the indictment, did wilfully, deliberately, premeditatedly, and of his malice aforethought, kill and murder Sarah S. Lamb in manner and form as charged in the indictment, they will find him guilty of the offence of murder in the first degree. 2. If the jury have reasonable doubt of the guilt of the defendant, they ought to give him the benefit of the doubt and acquit for that reason. 3. To warrant a conviction of the defendant, the jury must be satisfied by the proofs that Sarah S. Lamb is dead; that she met her death at the hands of the defendant as charged in the indictment, and in the county of St. Louis, as also charged."

The defendant was found guilty of murder in the first degree.

U. & J. T. Wright, for appellant.

I. The verdict and judgment are void for want of jurisdiction in the court. All the evidence is preserved and it fails to show that the alleged crime was committed in St. Louis county. This is fatal. (23 Mo. 509; 3 S. & M. 533.)

II. The paper purporting to be the statement of defendant on his examination before the justice was improperly received

in evidence. The transcript of the justice does not show a compliance with the precedent conditions essential to its admissibility as legal evidence. The justice could no more judicially certify that he construed correctly and enforced aright the provisions of the statute than a sheriff can return that he served a writ according to the provisions of law. The justice acts ministerially; the transcript must record what he did. (R. C. 1855, p. 1162, § 15, 16, 17.) It was error to let the justice supply by parol evidence the defects of the transcript. (1 Greenl. Ev. § 224, 227; 8 C. & P. 375, 547, 551; 2 Stark. Ev. 571.) The paper could not be read as a judicial confession because not taken in "due course of law," nor as extra-judicial because it purports to have been taken in his examination before a judicial tribunal in which the defendant was a prisoner by legal process on a legal execution. The court erred in permitting the justice to answer the question, "what took place or what was said and done between you and the prisoner at the time you took down the confession?" The evidence thus allowed to go to the jury embraced words of the justice and words of the defendant made during his examination, not contained in the written evidence of his statement.

III. The evidence was legally insufficient for conviction. The body of the offence was not proved *aliunde* the confession, and that is essential. (1 Hayw. 524; 15 Wend. 153; 2 Hale P. C. 290; Burrill on Circum. Ev. 678; Best on Presumptions, § 202; Hindmarsh's case, 2 Leach, 649; 26 Miss. 157; 12 Mo. 592; 4 Black. 357; 1 South. 239; Whart. C. L. 313; Wills on Cir. Ev. 61; 1 Wend. 53; Peck, 140; 1 Greenl. § 247; 17 Ill. 426; Rogers, N. Y., 150; Bible, Joshua, ch. 7, v. 22; 2 Sam. ch. 1, v. 16.) The confession in this case was falsified by the evidence as to the poisoning at Noble's. It is manifest from the confession itself that there were witnesses not in court who could have proved facts of the utmost importance bearing upon the *corpus delicti* so as to bring this case within the operation of the principle of Hennessy's case, 15 Wend. 153.

IV. The instructions were improper, and inadequate—improper, because they left the jury to the conclusion that the confession was competent to establish of itself, 1st, the fact of the death of Sarah Lamb; 2d, that she was killed by defendant; and 3d, that she was killed in the manner set out in the indictment, and that no independent proof need be shown to authorize a conviction;—inadequate, because there was no word of caution or light given to the jury as to how they should deal with confessions.

Mauro, (circuit attorney,) for the State.

I. The production of the dead body is not always indispensable in cases of capital homicide. The death may be inferred from circumstances. (See 3 Greenl. Ev. § 30; Commonwealth v. Webster, 5 Cush. 296; United States v. Gilbert, 2 Sumn. 27; U. S. v. Johns, 1 Wash. C. C. 372; Burrill on Cir. Ev. 679; People v. Ruloff, 3 Parker, 401.) The *corpus delicti* as well as the guilt of the defendant may be established by judicial confession made either in open court or on examination before a committing magistrate, though there be no corroborating circumstances proven in evidence. The same is true of extra-judicial confessions. Unquestionably so when the truth of such confession is made apparent by the proof of the truth, by evidence outside and independent of the confession, of facts and circumstances stated therein. (Joy on Conf. 64; 2 Russ. on Crimes, 824; 1 Phill. Ev. 111; 2 Stark. 39; MacNally on Ev. 51; 1 Hayw. 524; 7 Ired. 239; 11 Georg. 237; 15 Wend. 152; 16 Wend. 53; 12 Mo. 593; 17 Ill. 426.) The material inquiry is not, has the *corpus delicti* been otherwise established? but, are there corroborating facts and circumstance proven outside the confession establishing its truth? The confession in this case is a judicial confession. Besides, it is corroborated in so striking a manner by the proof of the matters stated in it as to produce the fullest assurance of its truth. Even if it be but an extra-judicial confession, it may be safely relied on for all purposes. The venue was proved. So the jury determined.

Scott, Judge, delivered the opinion of the court.

We will notice in their order the several points on which the prisoner seeks a reversal of the judgment against him.

A ground of complaint against the judgment of the court below is, that there was no evidence, or at least an insufficiency of evidence, to warrant the jury in finding that the murder was committed within St. Louis county, the county in which the indictment charges the crime to have been committed. It is maintained that the want of this evidence renders the verdict and judgment void, as showing that there was no jurisdiction in the court. The fact of the venue is like any other material fact in a criminal case; it must be satisfactorily proved; otherwise the prosecution must fail. There is no more importance attached to this fact than to any other material one, and an omission or failure to prove it is attended with no more serious consequences than an omission or failure to prove any other essential element in the crime. It is submitted to the jury like all other facts to be proved, nor is any other or a greater weight of evidence necessary to establish it than any other fact. The jury are the judges of the weight of the evidence, and if it causes conviction in their minds it is not the province of an appellate court to interfere, after the court before which the cause was tried has expressed its approbation of the verdict by refusing to grant a new trial. In our opinion, the evidence in the cause on this point was amply sufficient to warrant the verdict of the jury.

Complaint is also made that the court erred in permitting the confession of the prisoner taken before the committing magistrate to be read in evidence, inasmuch as it did not appear from the justice's transcript that he was distinctly informed of the charge made against him, and that he was at liberty to refuse to answer any question put to him; that the transcript merely stated that the prisoner, having been advised of his rights under the statute, made a voluntary confession. And it is maintained that it should have appeared

from the justice's examination that the accused was advised specifically of his rights under the statute, stating what they were ; that it was not for the justice to determine the rights to which he was entitled, but they should have been specifically mentioned, in order that the courts might ascertain whether the statute was complied with or not. It seems that the English statute on this subject did not require that the prisoner should be informed as to his rights. McNally says, it does not appear necessary that the magistrate, acting judicially under the direction of the statute of Phil. & Mary, should, in order to make the written confession evidence, warn the prisoner of its effects against him on the trial. (McNally Ev. 26 ; 2 Stark. Ev. 29.) Our statute only requires the examination to be taken in writing. Nothing else is required to be put down. As the examination of the prisoner might be read against him as a confession, there was a propriety in requiring it to be committed to writing that is not so obvious as to the facts preceding and accompanying it. That which was to affect the prisoner and which might be forgotten or perverted, the statute required to be written down, for plain reasons not applicable to other acts and forming no part of the confession. Without determining whether the examination might not have been read on the presumption that the officer had performed his duty ; inasmuch as the magistrate was sworn on the trial and proved that the specific information required by the statute was communicated to the prisoner, that the affidavit on which the warrant issued was read to him, and he informed that he was at liberty to refuse to answer any question put to him, we are of the opinion that the law was complied with and the prisoner deprived of no right to which he was entitled.

It was further objected to the validity of the judgment that the evidence was legally insufficient for conviction ; that, independent of the confession of the prisoner, there was no proof that Sarah Lamb was dead ; that she came to her death by any crime, or that she was killed in the manner charged

in the indictment ; that the body of the offence is not proved *aliunde* the confession, which is essential.

Confessions are either judicial or extra-judicial. Judicial confessions are those made in conformity to law before the committing magistrate, or in court in the due course of legal proceedings. It seems that these confessions, uncorroborated by any other proof of the *corpus delicti*, are sufficient to found a conviction, even if it be followed by a sentence of death, they being deliberately made, under the deepest solemnities, with the advice of counsel and the protecting caution and oversight of the judge. (1 Greenl. Ev. § 216.)

Extra-judicial confessions are those which are made by a party elsewhere than before a magistrate or in court. It is of these confessions, when uncorroborated by any other proof of the *corpus delicti*, that the question is made, whether they are sufficient to found a conviction. Whatever difference of opinion exists in respect to the weight which ought to be attached to evidence derived from these confessions, yet, where they are admissible and satisfactorily proved, they are deemed sufficient by the common law to convict a prisoner, even capitally, without the aid of any corroborative testimony of his having committed the offence. The principle thus stated does not exclude the idea that there may be evidence *aliunde* the confession of the *corpus delicti* and thus restricted it, is undoubtedly correct. (MacNally, 35 ; Joy on Conf. 64.) Instances may have occurred in which innocent persons have been convicted on false confessions ; and so, too, innocent persons have been convicted by the testimony of perjured witnesses ; but we are not therefore to reject all human testimony. No definite rules can be prescribed for ascertaining the credit to be given to confessions any more than to the evidence of witnesses. The weight to be attached to a confession, like the weight to be given to the testimony of a witness, must depend on the circumstances. The credit due it is a matter to be confided to the court and jury, and more justice will be done in the end by leaving each case to be

determined by its circumstances, than by attempting to impose arbitrary rules, which must result in many instances either in oppression to the accused or in impunity to the guilty. A modern author, speaking of the instances in which innocent persons have been convicted on confessions unfounded in truth, remarks that, whilst such anomalous cases ought to render courts and juries at all times extremely watchful of every fact attendant on confessions of guilt, these cases should never be invoked or so urged as to invalidate indiscriminately all confessions put to the jury, thus repudiating those salutary distinctions which the court, in the judicious exercise of its duty, shall be enabled to make. Such an use of these anomalies, which should be regarded as mere exceptions, and which should speak only in the voice of warning, is unprofessional and impolitic, and should be regarded as offensive both to the court and the jury. So it has been said that it appears inaccurate to give all kinds of confessions the same confidence, or to treat them alike with distrust. Like all other kinds of admissions, they admit of all shades of certainty and probability, from a solemn estoppel by matter of record to the slightest presumption arising from the most casual, suspicious or doubtful expressions. The jury are not only entitled, but bound to take into account all the circumstances under which a confession is made, and to give little weight to it, or throw it out of view altogether, according as these circumstances appear to incline less or more against the admission.

These observations apply unquestionably to confessions in cases in which it sufficiently appears from evidence outside the confession that the offence has been committed. But it is maintained that where the evidence of the *corpus delicti* is to be found only in the confession, and there is no positive testimony besides the confession that the crime has been committed, that a prisoner can not be convicted on his uncorroborated confession alone. We do not deem it necessary to enter into an examination of the abstract question whether, when the only evidence of the fact that a crime has been

committed is contained in the confession of the party charged with having committed the crime, he can be convicted on such a confession alone without any extrinsic corroborative circumstances. We term the question abstract, because such a case will rarely happen. The case of the prisoner is not of this class. Although the dead body has not been found, and although no witness swore that he saw the perpetration of the murder, yet the circumstances extrinsic to the confession, and established by other evidence, are so strong that they can not fail to satisfy any unbiased mind that the accused is guilty of the crime of which he has been convicted. We consider the true rule, as deduced from the current of authorities, to be, that an extra-judicial confession, with extrinsic circumstantial evidence satisfying the minds of a jury beyond a reasonable doubt that the crime has been committed, will warrant a conviction, although the dead body has not been discovered and seen, so that its existence and identity can be testified to by an eye-witness.

We do not deem it necessary to enter into an examination of all the authorities on this point. The rule as stated commends itself for its suitableness to the exigencies of all cases, and is in strict harmony with the principles on which all jury trials proceed. When the guilt or innocence of a prisoner is the subject of determination for a jury, they are the only competent judges of the sufficiency of the evidence to produce a conviction on their minds. When the evidence is legal and they are satisfied with its sufficiency, it is not for courts on fancied possibilities to disturb their verdicts. Our system of jurisprudence contemplates that jurors are as much superior to the courts in determining matters of fact as the courts are superior to them in deciding questions of law. The power of the courts to grant new trials finds no support in the mistrust of this principle, but is founded on the nature of the jury system, the liability of jurors to be misled, their being subject to err from undue influences to which they are exposed, and from the mode of their selection and the nature of their pursuits. (3 Greenl. Ev. § 30;

State v. Houser.

United States v. Gilbert et al., 2 Sum. 19; Burrill on Cir. Ev. 679; Whart. Cr. Law, 348-9.)

We are not of the opinion that the case made by the State was impaired or weakened by the failure to examine witnesses, who might have testified in relation to facts stated in the confession. It does not appear that any of the absent witnesses could have proved positively that the murder was committed; nor does it appear that the witnesses were within the power of the prosecution, or that any contrivance whatever was employed to keep them out of the way.

The prisoner asked no instructions, and we see no error in those given by the court. According to the law as has been stated, the confession, taken in connection with the extrinsic evidence, was amply sufficient to establish the fact of the murder of Sarah S. Lamb by the prisoner, in the manner charged in the indictment. The other judges concurring, the judgment will be affirmed.



THE STATE, Respondent, v. HOUSER, Appellant.

1. The St. Louis criminal court has power, of its own motion, to order a removal of a cause to the St. Louis circuit court on the ground that the judge of the said criminal court has been of counsel for the defendant; the local act of December 11, 1855, (R. C. 1855, p. 1591,) is confined to changes of venue made upon the application of the defendant.
2. Where an instruction given by the court could have had no influence on the verdict—there being no evidence upon which to ground it—an inquiry into its propriety as an abstract proposition of law will not be held obligatory on the supreme court.
3. Where it is sought to show the presence of the defendant at the time and place of the homicide by showing the identity of a shirt, with marks of blood upon it, found at the place of the homicide on the morning after its commission, with a shirt worn by the defendant on the day of the homicide, the fact, testified to by the person, a relative of defendant, at whose house the homicide was committed, that she gave the shirt up to the brother of the defendant on his demand, is evidence tending to show the real opinion of the witness as to the question of identity and ownership of the shirt—she having stated that when she gave the shirt to the brother she told him that she did not think it belonged to the accused.

4. The fact that a slung-shot was discovered in the pocket of a person on trial for a capital crime when about to be brought into court to be present at the rendition of the verdict is admissible in evidence against the accused on a second trial.

Appeal from St. Louis Circuit Court.

This was an indictment against Stephen H. Houser for the murder, in Gasconade county, on the 25th of July, 1853, of William D. Farris. The indictment was found at the September term, 1856, of the Gasconade circuit court. A change of venue was taken to the St. Louis criminal court. Houser was convicted in the criminal court, Lackland, Judge, presiding, and the judgment against him was reversed in the supreme court. (See — Mo. —.) Afterwards, at the election held in August, 1857, Judge Lackland was transferred to the St. Louis circuit court, and Henry A. Clover, counsel for Houser on the former trial, was elected judge of the criminal court; and the court, of its own motion, made an order removing the cause to the St. Louis circuit court on the ground that Judge Clover, of the criminal court, had been of counsel for Houser.

U. & J. T. Wright, for appellant.

I. The circuit court had no jurisdiction of the cause. Its judgment is void.

II. The court refused proper and legal instructions, and gave no equivalents. The case turned on the identity and ownership of the shirt. The court instructed the jury erroneously on the law of self-defence. (19 Mo. 506.)

III. The court erred in permitting evidence to be introduced as to the slung-shot four years after the homicide.

Mauro, (circuit attorney,) for the State.

I. The judge of the criminal court properly made the order on his own motion to change the venue. (R. C. 1855, p. 539, § 41, p. 1184, § 21, p. 1591; Jim v. State, 3 Mo. 147; Gates v. State, 20 Mo. 400.)

II. The testimony with respect to the slung-shot was ad-

State v. Houser.

missible in evidence. (Rosc. C. Ev. 17; *Fanny v. State*, 14 Mo. 390; *People v. Rathburn*, 21 Wend. 509; 11 Georg. 123; Whart. C. L. 332.) The instructions on the subject of self-defence were proper. (Rosc. Crim. Ev. 589; 1 Russ. on Crimes, 669; Whart. Hom. 219; 2 Com. 484; 12 Gratt. 730; 17 Georg. 484; 4 Dev. & Batt. 491.) The instruction complained of received the sanction of this court in *State v. Shultz*, 25 Mo. 153.

NAPTON, Judge, delivered the opinion of the court.

The first point taken in this case is, that the circuit court of St. Louis had no jurisdiction; that the change of venue ordered by the criminal court was contrary to the express terms of the act which regulates changes of venue in this county. The act in relation to changes of venue from the criminal court of St. Louis county declares that "no change of venue shall hereafter be allowed from the St. Louis criminal court except in the mode pointed out in the succeeding section of that act." The next section provides that "any party desiring a change of venue from said criminal court on account of any of the causes provided by law, shall present his petition to the judge of the St. Louis court of common pleas, in writing, verified by affidavit," &c. (R. C. 1855, p. 1591.) The change of venue in this case was not made upon the application of either party, the State or the defendant; but was made by the judge upon his own motion, for the reason that he had been counsel for the prisoner. The forty-first section of the general act concerning courts (R. C. 1855, p. 539) declares that "no judge or justice of any court shall sit on the trial of any cause or proceeding in which he is interested, or related to either party, or shall have been of counsel; but it shall be the duty of the judge to try said cause or proceeding by the consent of both parties thereto." The sixteenth section of the fifth article of the practice act in criminal cases provides that, where the circuit judge has been counsel in a criminal case, the case

shall be removed by the order of the court or judge to another circuit. The twenty-first section provides, that whenever it shall be within the knowledge of a court that facts exist which would entitle the defendant, on his application, to have the cause removed, the court may make the order without any application. The forty-first section of this act provides that sections sixteen, seventeen and eighteen shall not apply to St. Louis county, but that changes of venue shall in that court be governed by the special law. The special act regulating changes of venue in St. Louis county is, in our opinion, confined to such changes of venue as are made upon the application of the defendant, and was not designed to affect the right or duty of the criminal court to order a change where the judge of that court had been of counsel. The language of the second section of the act, as well as as its manifest intent, concur in establishing this interpretation. The sixteenth section of the general practice act in criminal cases recognizes the impropriety of allowing a judge to try a criminal cause in which he has acted as counsel, and makes provision for the removal of such cases arising anywhere throughout the state except in St. Louis county. This county was expressly excepted from its operation, manifestly for the reason that all original jurisdiction over criminal causes was taken from the circuit court of this county and transferred to a special tribunal. The provision was therefore inapplicable to St. Louis county, had there been no express words of exception in the act. It was probably through mere inadvertence that the special act regulating changes of venue in St. Louis county omitted any provision of the character contained in the sixteenth section of the general act, but the effect of that omission is only to throw the criminal court here upon the general provision contained in the act regulating courts, which we have referred to above, which, taken in connection with the twenty-first section of the criminal practice act and with the fifteenth section of the act which establishes the court (R. C. p. 1590)

authorized that court to send the case to the circuit court of St. Louis. We are therefore of opinion that the circuit court had jurisdiction to try this case.

The instructions upon the trial explanatory of the nature of the circumstantial evidence and of homicide in self-defence were objected to on the trial, and it is now insisted that the instruction relative to homicide *se defendendo* was erroneous, and that the one concerning circumstantial evidence was not sufficiently explicit and full, and should have been accompanied with the instruction asked on that point by the defence.

The court instructed the jury that in order to convict the defendant upon circumstantial evidence alone, "the circumstances tending to show his guilt should be established beyond a rational doubt by the evidence in the cause, and, when established, should point so strongly to the guilt of defendant as to exclude every other reasonable hypothesis." On behalf of the defendant the additional instruction was asked, "that all the facts established in evidence should be consistent with the idea of the guilt of the defendant." It is not perceived that there is any material difference between the instruction given by the court and the one asked by the defendant. If all the established facts are utterly inconsistent with the defendant's innocence, they must necessarily support the hypothesis of his guilt. If any one fact is found to be irreconcilable with the supposition of the defendant's guilt, it is impossible that all the facts should exclude the possibility of his innocence. The form in which the instruction is put by the court seems to be more directly pointed to the difficulties of the case, and better adapted to put the jury on their guard against a hasty or unwarranted conclusion unfavorable to the defendant than the one desired by the defence; for it does not appear that there was any one particular and prominent fact among the circumstances of the case which was supposed to be entirely inconsistent with the hypothesis of the defendant's guilt. There are cases in which a controverted fact of this character presents itself, and in which the

attention of the jury ought to be called to the rule of evidence which was asked in this case ; but there was nothing of the kind in the testimony given on this trial, and the court expounded the law applicable to the case as favorably to the defendant as it would have been if given in the words and form desired, telling the jury that if they could reconcile all the facts proved to them with any other hypothesis whatever than that of the defendant's guilt, they must acquit him.

In relation to the instruction concerning homicide in self-defence, it is sufficient to say that it was a mere abstraction, and any explanation of this branch of the law might, without error, have been omitted. There was no evidence on the subject, and, proceeding upon mere inferential reasoning on the facts in evidence, there was hardly any room for a rational conjecture that the case was one of self-defence. There was no eye-witness to the homicide, but the body of the deceased was found with six wounds from a knife in his left side and two in his right side, and with his throat cut to the bone, or, as one witness expresses it, "from ear to ear." No weapon of any kind was found upon or near the person of the deceased, and it was not the interest of the person who committed the homicide, or of the witness who first saw the body after the homicide, to have removed such a weapon, if any had been there. The defendant had been seen early the ensuing day a few miles from the place of the homicide, apparently unhurt, with no external marks of violence upon him, and making his escape with secrecy and celerity. These facts could not consist with the supposition of self-defence. The instruction concerning self-defence given by the court in this case seems to be in substance and almost in terms the same which was given in the case of Shoultz, 25 Mo. 153, in which latter case it seems quite as inapplicable as it was in this. The instruction in either case could have had no influence on the verdict, and we therefore deem it unnecessary to express any opinion of its propriety as an abstract proposition of law.

The refusal of the court to give the first instruction asked

State v. Houser.

by the defendant is also assigned for error. That instruction is as follows: "The jury are instructed that the statement made by Mrs. French, that she gave the shirt found upon the loom to Robert Houser, is not any legal evidence that the shirt belonged to defendant." That the acts and words of one person are no evidence against another, unless some complicity is established between them, is a truism in the law of evidence; and if this was the proposition designed to be asserted in the instruction, it might with propriety have been given. The examination of the witness (Mrs. French) in relation to the shirt found in the room where the homicide was committed, was directed to the identification of the shirt as the one worn by the defendant on the day when the disturbances occurred at Luster's. The witness was a relative of the defendant, and at her house the homicide occurred. She stated, upon her examination, that Robert Houser, the brother of the defendant, applied to her for the shirt, saying that *if* it was his brother's shirt he wanted it. She (witness) stated that she told Robert Houser that, in her opinion, it was not his brother's shirt, and she further stated that Robert Houser also said he did not think that the shirt was his brother's; but the witness, upon this application, gave up the shirt to Robert Houser. This witness was competent to identify the shirt, and it became material to ascertain what her opinion was on that subject. She said her opinion was that the shirt did not belong to the defendant, although, in her opinion, it resembled the defendant's shirts more than those of her brother, and although one of the sleeves was torn and in that respect corresponded with the defendant's, whose shirt sleeve had, according to other testimony, been torn in a scuffle at Luster's on the day of the homicide. Although the witnesses expressed the opinion that the shirt was not the defendant's, the fact she testified to was that she gave the shirt to the defendant's brother, who applied to her for it as the defendant's shirt. The testimony is admitted to be competent to account for the nonproduction of the shirt by the State. We think it was always competent to show the

real opinion of the witness on the question of identity and ownership. That belief it was the province of the jury to ascertain not only from the witness' words but from her acts. The instruction therefore, in the form asked, was rightly refused. It may be observed, in this connection, that the principal if not the only importance, which could attach to the testimony touching the identity of the shirt, was to establish the defendant's presence at the time and place of the homicide. Of this fact there was abundant other testimony of a circumstantial character, corroborated by the acknowledgments of the defendant, which, upon the most favorable interpretation, must be understood as explicit admissions of this fact.

The evidence, admitted, that the prisoner, whilst passing from the jail on a former trial, was found in possession of a slung-shot, is also objected to as incompetent. Flight, openly or secretly, following immediately on the commission of an act, has always been regarded as legitimate proof of guilt. Escapes, or attempts to escape, after incarceration, are not entitled to the same weight, and may be perfectly consistent with innocence. But all these circumstances have been considered as facts proper for the consideration of the jury. In Fanning's case, 14 Mo. 390, it was decided that the State could prove attempts of the prisoner to escape, three years after the alleged commission of the offence, with a false key. If a *slung-shot* is used for this purpose, that fact is equally important with the possession of a false key. Whether the slung-shot was made and concealed with a view to effect an escape, or for defensive or offensive purposes in combats occurring in the place of confinement, was a matter for the jury. There was testimony in this case on this point and the circumstance was open to comment.

All the judges concurring, the motion to stay execution is overruled.

SCOTT, Judge. It would have been no error had the court given the instruction in relation to the prisoner's brother taking away the shirt found at the house where the homicide

State v. Peters.

was committed. But as the instruction was made to assume the aspect of a comment on the evidence—that one fact did not warrant the inference of the existence of another—and as the instruction asked was a truism about which men competent to serve on a jury could not be deceived nor misled, its refusal could not have prejudiced the prisoner. The refusal of the instruction amounted to no direction that the taking away of the shirt by his brother was evidence against the prisoner.

As to the evidence in relation to the slung-shot, it may be remarked that, although evidence may be admitted which might have been excluded, yet, if the evidence upon the whole did not prejudice the cause against which it was received in the opinion of this court, it will not reverse the judgment. I am not prepared to say that, under all the circumstances, the prisoner was prejudiced by the admission of this evidence.

THE STATE, Respondent, v. PETERS *et al.*, Appellants.

1. When a slave is cruelly or inhumanly abused by a person who does not have such slave in his employment or under his charge, power or control, resort can not be had, in the punishment of such an offence, to an indictment founded on the forty-eighth section of the eighth article of the act concerning crimes and punishments. (R. C. 1855, p. 634.)

Appeal from St. Louis Criminal Court.

The facts sufficiently appear in the opinion of the court.
Kribben, for appellants.

Mauro, (circuit attorney,) and *Carroll*, for the State.

Scott, Judge, delivered the opinion of the court.

This indictment is founded on the forty-eighth section of the eighth article of the act concerning crimes and their punishments, which enacts that every person who shall cruelly

State v. Peters.

or inhumanly torture, beat, wound or abuse any slave in his employment or under his charge, power or control, whether belonging to himself or another, shall, on conviction, be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment. The indictment charges that Lewis Peters, Mary Peters and John Peters, on the 12th September, 1857, in St. Louis county, a certain slave, the property of and in the employment of the said Lewis Peters, with a goad and whip, which they, the said Lewis Peters, Mary Peters and John Peters, then and there in their right hand had and held, the said slave aforesaid then and there did cruelly and inhumanly torture, beat and abuse. A *nolle prosequi* was entered as to Lewis Peters, and Emily and Ludwig Peters were convicted and fined and imprisoned.

The law above cited was enacted in pursuance to a provision of our state constitution, which enjoined it as a duty on the general assembly to pass such laws as may be necessary to oblige the owners of slaves to treat them with humanity and to abstain from all injuries to them extending to life or limb. As the constitution and law recognized the relation of master and slave, the law was intended to prevent abuses of that relation, and hence those only are punished who inhumanly abuse a slave who is their property or in their employment. When slaves are cruelly used by those who do not bear to them the relation of master or quasi master, such offences stand on the same ground as when white persons cruelly use each other.

The slave alleged to be cruelly abused is charged in the indictment to have been the property of and in the employment of Lewis Peters. Now Lewis Peters was discharged from the prosecution. Then, as the slave was not alleged to have been the property of or in the employment of the other persons indicted, they could not be convicted under the indictment, as it did not appear that they had abused the relation of master and slave. Their offence was the same as if it had been committed on any other persons. It is needless

Steamboat Keystone v. Moies.

to inquire whether they might not have been accessories. In misdemeanors, all who assist in committing an offence are principals; and the indictment shows that they could not be principals, as they did not bear the relation of master to the slave. If they could have been charged as accessories, the indictment fails to do it. Nor is it necessary to inquire whether a wife may be indicted for cruelly abusing a slave belonging to or in the employment of her husband, as it does not appear from the indictment that Emilie Peters was the wife of Lewis Peters.

It will not be required of us, in this view of the case, to determine whether the indictment on its face does not show that the offence could not have been committed, as it is not easy for three to hold a whip and goad and seriously injure another, or whether there may be a "right hand" common to three people. Judgment reversed.



STEAMBOAT KEYSTONE, Respondent, v. MOIES *et al.*, Appellants.

1. If a consignee refuse to receive the goods consigned to him, it is the duty of the carrier to take such steps in relation to the goods as will advance the owner's interest and purposes consistently with a reasonable security to himself for his freight and charges; what he ought to do in a given case will depend upon circumstances; if, acting as agent for the owners, he pursues such course as men of ordinary prudence would follow, he will be protected by the law whatever may be the result.
2. A custom among steamboat carriers to return goods to the shipper if the consignee should refuse to receive them, and to charge freight upon the return trip as well as upon the out-going trip, would seem to be unreasonable if applied to all kinds and qualities of goods shipped.

Appeal from St. Louis Law Commissioner's Court.

This was an action to recover in behalf of the steamboat Keystone freight and charges upon certain iron castings shipped by the defendants at St. Louis and consigned to Eldridge Bro. & Co., at Wyandott, Kansas territory. It was in evi-

Steamboat Keystone v. Moies.

dence that the consignees refused to receive the castings at Wyandott. The boat brought them back to St. Louis. The plaintiff claimed seventy-two dollars freight to Wyandott, seventy-two dollars freight from Wyandott back to St. Louis, and six dollars charges. On the trial the plaintiff introduced two witnesses, who testified that the custom on the Missouri river is to deliver the freight according to the bill of lading, and, when the consignees refuse to receive it and pay charges, to bring it back and notify the shipper and charge the freight also on the back trip. The court gave the following among other instructions: "1. Wherever there is a uniform usage or custom in a particular trade, parties are presumed to contract in reference thereto, and in such case the usage or custom is understood to form a part of the contract unless it is expressly excluded by them, or unless it be inconsistent with the terms of their agreement."

The jury found for the plaintiff the sum of one hundred and fifty dollars.

Smith & Sedgwick, for appellants.

I. The custom attempted to be proved was unreasonable.

A. M. & S. H. Gardner, for respondent.

I. The custom proved was reasonable and not at all inconsistent with the terms of the contract.

NAPTON, Judge, delivered the opinion of the court.

The custom of returning goods to the place of shipment, where the consignee at the place of delivery has refused to receive them, may be a very reasonable one when the freight is very small in proportion to the value of the goods. In such cases the consignor would probably prefer that the boat should bring them back, and a custom to this effect, as it would be entirely consistent with the consignor's interest, would only show that the carrier, in acting as the agent of the consignor, had discharged his duty and acted as the consignor himself would have done if he had been in a position

to be consulted. But where the goods are of a perishable nature, or where the freight constitutes a large proportion of their value at the place of consignment, such a custom would hardly obtain and would certainly be very burdensome to shippers. If a cargo of West India fruit is brought up from New Orleans and the consignee here refuses to receive it, would the carrier be justified in taking it back to New Orleans, at the hazard of losing it entirely and with a certainty that it would be worth greatly less there than here? If a cargo of salt or iron is shipped from here to a point high up the Missouri, shall the boat, in the event that the consignor refuses to receive it, bring it back to St. Louis, where the freight up and down will exceed the full value of iron or salt here? Such a custom, if it exists, would seem to be unreasonable, and could not therefore be acquiesced in by shippers, since it could be productive of no benefit to them. There is no doubt that the boat has a lien on the goods for its freight and is not bound to deliver them up to the consignee until the freight is paid. (3 Kent, 220; *The Schooner Volunteer*, 1 Sumn. 551; *Abbott on Shipping*, 37.) If the consignee refuses to receive the goods, the carrier may deposit them at the place of delivery in a warehouse, with directions to be delivered to the owner upon payment of charges. (*Fisk v. Newton*, 1 Denio, —; *Magill v. Potter*, 2 John. Ca. 371.) In England the practice is to send such goods as are not required to be landed at any particular dock to a public wharf, and order the wharfinger not to part with them until the freight and other charges are paid. (*Abbott on Shipping*, 378.)

The principle upon which the carrier's duty is based, in the event of a refusal of the consignee to receive the goods, is simply to regard himself as an agent for the owners, and as such invested with authority to take such steps in relation to the goods as will advance the owner's interest and purposes consistently with a reasonable security to himself for his freight and charges. What he ought to do in a given case will manifestly depend upon the circumstances, and there

Steamboat Keystone v. Moies.

can be and ought to be no universal rule in course to be followed in all cases. If, acting as agent for the owners, he pursues such course as men of ordinary prudence would follow, he is protected by the law, whatever may be the result. In the case of *Arthur v. The Schooner Cassius*, 1 Story C. C. 97, Judge Story considered it the duty of the master to land the freight at the port of destination, and, if the consignees refused to receive it, "to place it in the hands of some trustworthy person for the security of his lien for freight, and subject thereto for the benefit and account of the owners." "No right," he adds, "even under such circumstances, could exist on the part of the master to sell the cargo unless it was perishable and might otherwise have been lost or have perished." If there is no warehouse or no responsible or trustworthy person at the place of consignment, as may happen at some landings on our rivers, the carrier would certainly not be authorized to leave them on the shore exposed to injuries by the weather or by depredations. (*Ostrander v. Brown*, 15 Johns. 39.) In such an event, he is thrown upon the rule to which we have already adverted, of taking such course as will secure his freight, and at the same time advance, as far as ordinary prudence can foresee, the interest of the shipper; and it is quite manifest that if the master lands the goods at the nearest or most convenient port above or below the point of consignment, where warehouses and responsible agents may be found, and apprizes the owners of what has been done, he has discharged his duty, and will not be held responsible for losses, if any should happen. This would undoubtedly be the law, where the cost of transportation entered very largely into the value of the goods at the place of their destination, and where, as a matter of course, the property would be more valuable to the owner at that place than at the place from which they were shipped. If the goods consisted of a package of jewels or of a box of costly articles, whose value was great in proportion to the cost of transportation, it might reasonably be inferred that the refusal of the particular consignee to whom they

Annis v. Bigney.

were forwarded to receive them would justify and perhaps require the carrier to return them to the consignor. Such course would be justified on the same principle which would authorize the carrier to leave goods of another description in a warehouse at the port of destination or the port nearest thereto where warehouses could be found. In both cases it is consulting the apparent interest of the owners and at the same time securing the claim of the carrier for his freight.

We shall send the case back to be tried on these principles. The verdict was rendered under an instruction confining the jury to the mere question of a custom, about which the evidence was very slight and unsatisfactory. The steamboat masters, who were examined, spoke of a general practice of returning freight to the owners here where the consignees refused to receive it, but did not explain the character of the goods so returned and received and paid for. They may have been misled by one or two incidents falling under their observation, and supposed that a case here and there, perhaps perfectly consistent with our understanding of the law, constituted a custom universally applicable under all circumstances. We doubt the existence of a custom so totally destructive of the interests of shippers as was imagined to be established in this case. With the concurrence of all the judges, the case is remanded.



ANNIS, Appellant, BIGNEY *et al.*, Respondents.

1. The St. Louis law commissioner's court has jurisdiction of an action for the possession of specific personal property in which the value of the property claimed is alleged to be one hundred and fifty dollars and the damages claimed for the detention are fifty dollars; it is the value of the property claimed that determines the jurisdiction.

Appeal from St. Louis Law Commissioner's Court.

Bland & Coleman, for appellant.

A. M. & S. H. Gardner and Huffman, for respondents.

Steamboat City of Memphis v. Matthews.

NAPTON, Judge, delivered the opinion of the court.

This was a suit before the law commissioner, in the nature of an action of replevin, and the property claimed was alleged to be of the value of one hundred and fifty dollars and the damages claimed were fifty dollars. On demurrer the court held the amount claimed exceeded the jurisdiction of the court. The statute gives the court jurisdiction where the value of the property claimed does not exceed one hundred and fifty dollars. (R. C. 1855, p. 1597.) The law regulating the action gives the damages for the detention of the property. It is the value of the property claimed which regulates the jurisdiction and not the damages, which are a mere incident, like interest to a debt. The other judges concur; judgment reversed and remanded.



STEAMBOAT CITY OF MEMPHIS, Respondent, v. MATTHEWS
et al., Appellants.

1. The supreme court will not grant new trials on the ground that verdicts are against the weight of evidence; it is the province of the jury to attach such credit to the testimony of witnesses as they may think it entitled to.

Appeal from St. Louis Circuit Court.

Hamilton for appellants.

NAPTON, Judge, delivered the opinion of the court.

This case falls within the principle decided by this court in *McAfee v. Ryan*, 11 Mo. 365. The instructions were not excepted to, and indeed are admitted to be a correct exposition of the law applicable to the facts in evidence. All the testimony was on one side, but the jury disregarded it, and the circuit court, who heard the witnesses, sanctioned the verdict of the jury. We must infer from this that the circuit court was satisfied with the course of the jury. The credit due to witnesses is a matter peculiarly for

Kelly v. Johnson.

a jury, and any control over the finding of a jury in this respect could hardly be judiciously exercised by this court, which possesses no means of forming a correct opinion, and must be guided altogether by what appears on the face of the record. The circuit judge would not of course permit a verdict to stand against his own instructions, and as that court has virtually certified to us that the verdict was right we can not interfere. The cases of the State v. Packwood, 26 Mo. 340, and Phillips v. Riley, 27 Mo. 386, stand upon different principles. The other judges concurring, the judgment is affirmed.



KELLY, Plaintiff in Error, v. JOHNSON *et al.*, Defendants in Error.

1. A resulting trust arises by operation of law where the purchase money of real estate is paid by one person and the legal title is transferred to another. The relation of trustee and *cestui que trust* in such cases must result from the facts as they exist at the time of or anterior to the purchase, and can not be created by subsequent occurrences.
2. It is not essential to the creation of a resulting trust that the money advanced should come directly from the *cestui que trust*; it is sufficient if it satisfactorily appear that the person supplying it intends it as a gift or loan to such *cestui que trust*.

Error to St. Louis Land Court.

This was an action commenced September 17, 1856, against Benjamin Johnson and Frances A. Graham. The petition set forth that in March, 1853, Johnson purchased and took to himself a conveyance of an undivided half of certain real estate; that he held it in trust for himself and one Robert Graham equally; that Graham had furnished one-half the purchase money under an understanding that they should be tenants in common of said interest in said land although the conveyance was made to Johnson alone; that Graham died about August 1, 1855, having first devised his interest in this land to Jane Kelly, plaintiff; that Johnson refused to convey

Kelly v. Johnson.

the interest so devised to Jane Kelly ; that Frances A. Graham, widow of Robert Graham, claims to be the owner of the interest devised to Jane Kelly. The petition prayed that Johnson might be compelled to convey the undivided half of said land to said Jane Kelly.

The answer of the defendants set up that before the commencement of this suit Johnson had conveyed the said undivided half of the land purchased by him to the defendant Frances A. Graham ; that Johnson made the cash payment on account of said purchase, and gave his notes secured by deed of trust for the balance ; that afterwards Robert Graham advanced money to take up these notes (amounting to one-half the purchase money) under the verbal understanding and agreement that he (Johnson) should hold the one-half interest aforesaid in trust for the sole and separate use and benefit of said Frances A. Graham ; that Johnson accepted the trust, and continued to hold said interest subject to it until he conveyed the trust property to the *cestui que trust*, Mrs. Graham.

The consideration of the conveyance to Johnson was one thousand two hundred dollars. Robert Graham, by will, devised his interest in the land in controversy to the plaintiff, Mrs. Jane Kelly, his sister. Declarations of both Johnson and Graham, to the effect that they owned the land together and were jointly interested in it, were introduced in evidence. The defendants offered a deed dated April 3, 1856, from Johnson to Mrs. Graham conveying to her the undivided interest of one-fourth, recited therein to have been held in trust for Mrs. Graham. This deed was delivered April 5, 1856, but was not recorded until October, 1856. Plaintiff had no notice of it until its record. At the instance of the defendants the law was declared as follows : " If the deed from Benjamin Johnson to Frances A. Graham, read in evidence, is genuine, the plaintiffs are not entitled to the relief prayed in their petition." The plaintiffs thereupon suffered a voluntary nonsuit, with leave, &c. The husband of Mrs. Kelly died pending the suit, and it was continued in her name.

Kelly v. Johnson.

Gantt, for plaintiff in error.

I. The deed from Johnson to Mrs. Graham cuts no figure in the case at all. It was not known to the plaintiff before the commencement of this suit. On his own showing the interest retained by Johnson was abundantly sufficient to support a decree for a conveyance prayed for by the plaintiff. The case of *Brueggeman v. Jurgensen*, 24 Mo. 87, is not applicable. Even if Johnson had retained no interest in the land, the doctrine of that case would not be applicable. Both parties interested are before the court. Mrs. Graham is a volunteer, and not a *bona fide* purchaser for value. Graham had a resulting trust in the land which he disposed of to his sister. The answer seeks to set up a different trust, but there is no evidence to support it. Graham had no such understanding.

Krum & Harding, for defendants in error.

I. The relief prayed for can not be granted. (*Brueggeman v. Jurgensen*, 24 Mo. 87.) It makes no difference that Mrs. Graham is a party to this suit. No relief is prayed against her. She is not nor is Johnson charged with any fraudulent conduct. The plaintiffs, by their testimony, made out no case which would authorize the court to grant the relief prayed for. They are forced to rely on the admissions of the answer. These admissions must be taken as a whole. They show that there was no resulting trust in favor of Robert Graham. Graham advanced no money until after the purchase. (*Hill on Trustees*, 97.)

NAPTON, Judge, delivered the opinion of the court.

A resulting trust arises by operation of law, where the purchase money of an estate is paid by one and the legal title is made in another. In such case the person named in the conveyance is regarded as a trustee for the party from whom the consideration proceeds. This doctrine is based upon the common law principle that a feoffment without consideration results to the use of the feoffor. But the relation of trustee

and *cestui que trust* in such cases must result from the facts which occur at the time of or anterior to the purchase, and can not be created by subsequent occurrences. Hence where an agent is employed to purchase a tract of land and the purchase is made and the title taken in the name of the agent, and no part of the purchase money is paid by the principal at the time of or previous to the purchase, the trust is within the statute of frauds and can not therefore be enforced if its existence is denied by the agent. (Hill on Trustees, 97 and cases cited.) Where a trustee purchases in the name of a third person with trust funds, the resulting trust, it has been held, will not be to himself but to his *cestui que trust*. (Russell v. Allen, 10 Paige, 249.) So it has been held that it is not essential to a resulting trust that the money advanced should come directly from the *cestui que trust*, if it satisfactorily appears that the person who supplied it intended it as a gift or loan to such *cestui que trust*. (Page v. Page, 8 N. H. 187; Gower v. Tradesman's Bank, 4 Sand. 106; Boyd v. Maclean, 1 John. Ch. 582.)

The answer in this case alleges that Johnson (one of the defendants) made the payment of one-half of said purchase money out of his own means, and gave his notes, secured by a deed of trust on the property, for the unpaid balance; "that at the maturity of said notes, he paid and discharged them with money which said Graham advanced and paid to him under the express and distinct verbal understanding and agreement that he, said Johnson, should thenceforth hold said one-half of the interest in said land which he had purchased in trust for the sole and separate use and benefit of his defendant Frances A. Graham, then the wife and now the widow of said Robert Graham," &c. This answer admits a trust as to one-half of the land, but seems designed to raise a resulting trust in Mrs. Graham, and not in her husband. It is not stated in so many words that the money advanced by Graham was money belonging to the wife, nor that Graham designed it or treated it as a gift to his wife; but it was probably intended so to be inferred that the money was a gift to the separate

Kelly v. Johnson.

use of the wife, and, consequently, that the use of the land would result to her and not to the husband. It is evident that if the money advanced by Graham was not either the separate property of the wife or a gift to the wife, the resulting trust would be to the husband, and a parol declaration changing the direction which the implication of law would give it, if valid at all, could at all events be revoked by similar ones at a subsequent period. If the deed had been made in the name of the party intended to be benefited by it, this would not be so, for then a subsequent change of intention could not have the effect of altering the nature of the transaction so as to convert the donee into a trustee for volunteers subsequently claiming under him. (*Birch v. Blagrove*, Ambl. 266.) But even in such cases, a subsequent disposition of the property by will would raise the case of an election against the donee if the donee claimed any benefit under the will. (*Cecil v. Butcher*, 2 Jac. & Walk. 578; *Dummer v. Pilcher*, 2 Mylne & Keen, 262.)

It will be seen from the bill of exceptions in this case that none of the questions we have here briefly alluded to, and which we suppose must ultimately determine the merits of this suit, were decided in the land court. The case went off on an instruction that the deed from Johnson to Mrs. Graham, if genuine, was an end of the controversy so far as the relief asked for in the petition was concerned, and precluded the necessity, we suppose, of investigating the effect of the will and the alleged trust. As Mrs. Graham and Johnson were both parties to the suit, and the former was a mere volunteer, we do not see what obstacle the deed could form to an equitable decree settling the rights of the parties and placing the title wherever the testimony and law might warrant. In the present position of the case, it is impossible for us to express any opinion decisive of the merits. Not regarding the deed from Johnson however as a bar to the relief sought, we will reverse the judgment and remand the case for a new hearing in the land court. Judgment reversed and remanded; the other judges concur.

BEAUPIED, Plaintiff in Error, v. JENNINGS, Defendant in Error.

1. A. bequeathed a female slave with other property to his daughter B., and directed that all the property, real and personal, should be placed in the hands of C. for the use and benefit of said B. In a codicil to this will, duly executed, there was the following provision: "It is further my will that the negro girl Eliza, that I have bequeathed to my daughter B., shall have the privilege to choose some person to buy her in case she [shall] not be satisfied to live with my daughter B." The said slave communicated to the said C. her unwillingness to live with B. and made choice of a master, and C. sold her to the person thus chosen. *Held*, that the purchaser acquired a good title.
2. A privilege, conferred by will upon a slave, of choosing some person to buy her in case she should not be satisfied to live with the person to whom she had been bequeathed, is not, it seems, inconsistent with the legal idea of slavery.

Error to St. Louis Court of Common Pleas.

This was an action for the possession of a slave called Eliza and her three children. As evidence of title, the plaintiff, Louis Beaupied, adduced in evidence the will of John Howdeshell, deceased, the former owner of said slave Eliza. The will was dated October 27, 1849, and proved January 19, 1853. It contained the following clauses: "*Fourth.* I give and bequeath unto my daughter Ann my negro girl named Eliza at the valuation of four hundred and fifty dollars. *Ninth.* It is my will that all that portion of my estate, both real and personal, which may fall to Ann from my estate, shall be placed in the hands of George Hall for her special use and benefit, who consents at my request to act as guardian for my daughter Ann Howdeshell." He devised all his property to be divided equally among his children, the specific bequests to be estimated at the valuation stated in the will in determining each child's portion. The following codicil, dated December 31, 1852, was also introduced in evidence: "In addition to the foregoing will dated October 27, 1849, I make this codicil to the same; that is to say, it is my will and wish so to change or alter that

Beaupied v. Jennings.

portion of said will so as to give that portion of my estate which I have given or bequeathed unto my daughter Ann, who has since intermarried with Louis Beaupied, shall, in case she shall die before her husband, [*sic*,] the same to be equally divided between her sisters and brother. It is my further will that the negro girl Eliza, that I have bequeathed to my daughter Ann, shall have the privilege to choose some person to buy her in case she [shall] not be satisfied with my daughter Ann, and the proceeds of the sale of said negro girl Eliza shall go in the hands of George Hall, or his legal representatives, for the benefit of my daughter Ann. It is further my will that my daughter Ann shall receive the interest on her portion of my estate, the same to be paid to her annually by the said George Hall, or his legal representatives. In witness whereof," &c.

George Hall, a witness for plaintiff, testified on cross-examination that in a conversation had in the presence of Beaupied (plaintiff) and of himself, the negro Eliza stated that she would not live with Ann (the plaintiff's wife), and elected to choose a master; that time was given her for that purpose; and that afterwards she said she had elected John C. Jennings, the defendant, to buy her. This testimony was admitted against the objection of the plaintiff. It also appeared in evidence that the administrator of Howdeshell delivered the said Eliza to said George Hall as trustee under the will.

The court, of its own motion, gave the following instruction: "1. If the jury believe from the evidence, that the slave Eliza was not satisfied to live with Ann Howdeshell, the wife of the plaintiff, and chose the defendant to be sold to him; and if George Hall, named in the will of the testator John Howdeshell, sold the said Eliza to the defendant according to her said choice, and also sold her said children, and that the said slaves were sold and delivered to the defendant before the commencement of this suit, then the plaintiff is not entitled to recover, and the jury will find for the defendant."

Beaupied v. Jennings.

The court refused the following instructions asked by the plaintiff: "2. If the jury believe from the evidence that the slave Eliza mentioned in the petition is the same slave bequeathed to Ann, the wife of the plaintiff, by the will of her father John Howdeshell, which was read in evidence; that the plaintiff, at the time this suit was brought, was the husband of the said Ann, and that the defendant, at the time this suit was brought, was in the possession of said slave Eliza, then the plaintiff is entitled to recover as to said slave Eliza and her children born since the death of said testator. 3. If the jury believe from the evidence that the negro boy John Louis, mentioned in the petition, was in possession of the defendant when this suit was brought, is the child of the said slave Eliza, and was born after the death of the testator Howdeshell and before the sale of said slaves to the defendant, that the slave Eliza is the same bequeathed to Ann, the wife of the plaintiff, in the will read in evidence, and that the plaintiff, at the time of bringing this suit, was the husband of the said Ann, then they will find for plaintiff as to said boy John Louis."

The defendant asked and the court refused the following: "The court instructs the jury that there is no evidence before them showing title or the right of possession in the plaintiff of the slaves in dispute at the commencement of this suit, and they will find for the defendant."

The plaintiff took a nonsuit with leave, &c.

Hayden, Thomas & Sharp and Lackland, for plaintiff in error.

I. The clause relied upon by defendant can not be regarded as an operative part of the will. It is from its nature and the manner of expression a mere wish or desire of the testator. A slave can not be the owner of property. Whatever he acquires a right to belongs to his master. (25 Mo. 44; 21 Ala. 274.) The right to choose a master is property as well as any beneficial right. A slave can not possess it. It is a right in derogation of the rights of the master. A slave

Beaupied v. Jennings.

can acquire no rights in derogation of the power and authority of the master. The daughter of the testator was intended to be the real owner of the slave. The interest must have completely vested in her or her trustee for her. Choice implies liberty, freedom of will. How can a chattel possess this? In a criminal case, of course, for public purposes, the law is different; but in civil cases, admit that a slave possesses freedom of will and power of expressing that freedom in reference to his condition in one particular, and we must admit it in all. We can not say a slave may have so much power, not so much; this right, not that. The distinction must rest on quality, not quantity. If a slave may have choice, and power to exercise it uncontrolled by his master, in reference to that slave's condition, he is no longer a slave. He is either a freeman or an anomaly between a freeman and a slave. It is the settled policy of the law; and courts have uniformly refused to allow bequests, no matter how solemnly expressed and clearly proved, by which the liberty of choosing a power to determine some thing in reference to their own condition is bequeathed to slaves. The law recognizes only two conditions, freedom and slavery; no intermediate state; and will not allow a slave to possess a power inconsistent with his own condition and in derogation of his master's authority. (*Peggy & Mary v. Legg*, 6 Munf. 229; *Wynn v. Carroll*, 2 Gratt. 227; 9 Gratt. 539; *Abercrombie's Ex'r v. Abercrombie*, 27 Ala. 494; *Graves v. Allen*, 13 B. Monr. 190; *Skrine v. Walker*, 3 Rich. Eq. 269; 5 Maryl. 92.)

Cline & Jamison, for defendant in error.

NAPTON, Judge, delivered the opinion of the court.

The question in this case is not whether the privilege, conferred by Howdeshell's will upon his slave Eliza, of selecting another mistress in the event of her being dissatisfied with Mrs. Beaupied, could be enforced, but whether, after the trustee to whom the enforcement of this privilege was en-

trusted has complied with the directions of the will and sold the slave to the person she selected, the legatee can now maintain an action against the purchaser to recover back the slave and her children; and we are of opinion such action can not be maintained. This will is not to be understood as making an absolute bequest of a specific slave to the testator's daughter. The legal title to the slave is put in a trustee, and that trustee is authorized, and indeed required, in a certain contingency, to sell the slave and hold the proceeds for the benefit of the legatee. The trust has been complied with, and as the trustee had, beyond doubt, the power of sale, the purchaser acquired a good title.

There is nothing in the institution of slavery as understood in the slaveholding states inconsistent with the concession of a privilege of this kind to a slave. The practice is very common and commendable, and the courts will respect the humanity and kindness by which such arrangements are dictated, and will assuredly not interfere with them when voluntarily carried out. Slaves are not mere chattels, nor do our laws or usages so regard them; nor, as human beings, are they regarded as incapable of volition or choice; and the writers, if there be any, who have so represented, are treating of it as an abstraction, and probably know nothing about it practically. The relation between master and slave is regulated by a variety of laws, all having in view to enforce their reciprocal rights and duties, obedience and submission on the one hand, and protection and kindness on the other; and although these rights and duties, to some extent, like those of parent and child, can, from their very nature, be enforced but imperfectly, yet their existence and validity is recognized, and any deviation from them is punished in the same way and to the same extent as a dereliction of other moral obligations.

The instructions given by the court were correct, and the judgment will therefore be affirmed. The other judges concur.

Castello v. St. Louis Circuit Court.

SCOTT, Judge. So far as the opinion in this case sanctions the doctrine that a trustee, if directed by the terms of a trust, may, as against a *cestui que trust*, apply the trust property in a way contrary to law, I do not concur in it. I am of the opinion the judgment should be affirmed.

CASTELLO V. ST. LOUIS CIRCUIT COURT.

1. Where an inferior judicial tribunal declines to hear a cause upon what is termed a preliminary objection—as where, in a statutory proceeding instituted to contest the election of a sheriff, the court refuses to try the cause upon the merits but dismisses the same and quashes the proceedings on the ground that the contestant had not given the notice required by the statute—a mandamus will lie from the supreme court commanding the inferior court to reinstate the cause upon its docket and proceed to try the same, if such court had misconstrued the law in such preliminary matter. (SCOTT, Judge, dissenting.)
2. In proceedings instituted under the act regulating elections to contest the election of a sheriff, the contestant must, as required by the fifty-fifth section of said act, give notice in writing within twenty days after the votes are officially counted; the essential constituents of the notice in such case are set forth in the fiftieth section of said act; only one notice is contemplated or required.
3. Should the contestant not give the required notice, the court should quash the proceedings.

Application for Mandamus.

This was an application to the supreme court for a mandamus directed to the St. Louis circuit court. The following is the petition for the mandamus:

“To the honorable the judges of the supreme court of Missouri—October term, 1858—the petition of James Castello is respectfully submitted. Your petitioner states that at the late general election in and for St. Louis county, Missouri, held on the first Monday in August, 1858, being the second day of said month, he was duly and legally elected and chosen sheriff of the said county of St. Louis according to the statute in such case made and provided; that at the

Castello v. St. Louis Circuit Court.

time when your petitioner was so elected to said office of sheriff, he was and still is qualified to fill the same, and was and still is competent and eligible thereto by law. Your petitioner avers that at the said election he received a larger number of the legal votes cast than any other candidate for the said office of sheriff. That notwithstanding what is above stated, one Michael S. Cerre, who was a candidate for the same office at said election, and who in fact and truth received a less number of the legal votes cast thereat than your petitioner, obtained a certificate of his election to said office under the twenty-first section of the act to regulate elections, approved December 8, 1855, (R. C. 1855, p. 698,) as having received the highest number of votes cast at said election. And your petitioner avers that on the 11th day of August, 1858, the said Michael S. Cerre gave bond and qualified as sheriff of said county, and has been ever since exercising the duties thereof by virtue of his said pretended election. That the votes cast at said election were officially counted on the 7th day of August, 1858. That afterwards your petitioner took the following steps to contest the election of said Michael S. Cerre to said office and to establish his (petitioner's) own right thereto; that is to say, on the 17th day of August, 1858, your petitioner caused to be served upon said Cerre a notice, of which the following is a copy: 'To Michael S. Cerre, Esq.: Sir—You are hereby notified that I claim that at the late election for sheriff of St. Louis county, Missouri, held on the 2d day of August, 1858, being the first Monday of said month, in the city and county of St. Louis, I was duly and legally chosen sheriff of said county of St. Louis, and that I shall contest your right to hold said office, I being in fact entitled to the same according to the statute in such case made and provided. St. Louis, August 17, 1858. James Castello.' The said notice was given in accordance with the provisions of section fifty-five of the aforesaid act to regulate elections, (R. C. 1855, p. 706,) and after being served was filed in the office of the clerk of the circuit court of St. Louis county on said 17th day of August, 1858.

Castello v. St. Louis Circuit Court.

That on the 18th day of September, 1858, your petitioner caused to be served on said Michael S. Cerre another notice in writing in accordance with the provisions of section fifty of said act to regulate elections, (R. C. 1855, p. 705,) fully specifying the grounds on which he intended to rely in contesting the election of said Cerre to said office, also stating therein sundry objections to voters at said election, who had voted at said election for said Cerre, and giving therein the names of said voters to about the number of nine hundred. This last mentioned notice was served on said Cerre fifteen days before the regular October term of said circuit court of St. Louis county, which was begun and held on the 4th day of October, 1858, and was filed in the office of the clerk of the said circuit court on the 18th day of September, 1858. Said last mentioned notice is fully and truly copied in the transcript hereto annexed, beginning on page two and ending on page twenty-seven thereof. And your petitioner avers that afterwards and in accordance with the provisions of section fifty-eight of said act to regulate elections, (R. C. 1855, p. 706,) said Cerre caused to be served upon your petitioner six days before said October term of said circuit court, beginning as aforesaid, a notice in writing, denying all the allegations in your petitioner's said notice of September 18th, and requiring proof thereof, and also setting forth much specific matter of objection against your petitioner's right to said office, and specifying the names of four or five thousand persons who, he therein alleged, illegally voted for your petitioner at said election, with specific objections to the qualifications of said persons to vote at said election. Said last mentioned notice is fully and truly copied in the transcript hereto annexed, commencing on page thirty-one and ending on page one hundred and thirty-one thereof, and was filed in the office of said clerk on the 6th of October, 1858. That afterwards, on the 11th day of October, 1858, that being the 8th day of the October term of said court in said year, said circuit court, on the motion of said Cerre, refused to comply with the directions contained in section sixty of

said act to regulate elections and try said cause on the merits, and quashed and annulled all the proceedings therein on the part of your petitioner to contest said election of said Cerre to said office, and struck your petitioner's said cause from the docket for the reason that your petitioner's said notice of September 18, 1858, specifying the grounds on which he intended to rely in his contest and giving his objections to qualifications of voters for said Cerre, with the names of said voters, had not been served on said Cerre within twenty days after the votes of said election had been officially counted. The court held that, for the reason aforesaid, there was no jurisdiction, power or authority in the said circuit court to try the said cause. And it was for no other cause or reason that the said circuit court quashed your petitioner's said proceedings and refused to try said contest, and struck the cause from the docket of said court. Now inasmuch as the cause of your petitioner is one of great public concern and he is advised that there is no remedy by which the wrongs above complained of may be redressed save by the process of mandamus, he prays this court to exercise the superintending control, which it possesses, of the said circuit court, in his behalf, by awarding against the said circuit court a writ of mandamus *procedendo*, commanding and requiring the said circuit court of St. Louis county, without further delay, to reinstate, take cognizance of, and try upon its merits, the cause of your petitioner against the said Michael S. Cerre, or to return into this supreme court sufficient reasons and causes why the same should not be done; and your petitioner prays for such other process, orders and remedies as may rightfully appertain to his case; and, as in duty bound, your petitioner will ever pray," &c.

This petition was duly verified by the oath of the petitioner James Castello.

The supreme court having announced its determination to award an alternative mandamus, the issuing of the writ was waived by the parties, and it was agreed that the judge of the circuit court should put in an answer to the above peti-

Castello v. St. Louis Circuit Court.

tion as to an alternative mandamus, setting forth the points ruled by him and his reasons for refusing to enter upon the adjudication of the cause of *Castello v. Cerre*. This agreement and understanding was communicated to Judge Lackland, of the circuit court, in the form of a note addressed to him by the counsel of both Mr. Castello and Mr. Cerre. The following is the response of Judge Lackland :

“Messrs. Glover, Thomas and Hill.

“Gentlemen—I received your note of 30th ult. and cheerfully comply with your request, and submit the points and propositions raised and discussed in the matter of the contested election of the sheriff of St. Louis county, and the decision of the court thereupon and the reasons given therefor, as well as I can now recollect them.

“On the 4th of October, 1858, as appears by the record, Castello, by his counsel, submitted to the court a motion for the appointment of three discreet persons to count the ballots cast for Cerre and himself respectively for the office of sheriff at the last August election, and, before any action was taken upon this motion, the counsel of Cerre interposed a motion to quash and dismiss the proceedings upon the ground that there had been no sufficient notice served upon Cerre as required by the act concerning elections. The court decided that the motion to quash would be considered first in order. It appeared that Castello had served two notices upon Cerre, one a general notice served on the 17th of August, 1858, and the other a special notice, served on the 18th of September, 1858. The former notice appeared to have been served by Thomas Chadbourne, by delivering a copy thereof to Cerre on the 17th of August, 1858; and the second notice appeared to have been served as follows: Thomas Talis had made three copies thereof and delivered one to Samuel Simmons, another to Stephen Rice, and a third to Edward J. Castello. Samuel Simmons, on the 18th of September, 1858, delivered his copy to Thomas C. Reynolds, Esq., attorney for Cerre. Stephen Rice delivered his copy to Thomas M. Barron, the deputy and clerk of Cerre, on the

Castello v. St. Louis Circuit Court.

date last above mentioned. Edward J. Castello delivered his copy on said day to a white person over the age of fifteen years at the farm of Cerre, in the county of St. Louis, state of Missouri.

"The objections to these notices were various. The notice served on the 17th of August, 1858, was objected to upon the grounds that it was too general; that it stated nothing more than that Castello had been elected sheriff and that Cerre had not; that it did not specify any grounds on which Castello intended to rely; nor did it state any objections made to qualifications of any voters; nor did it give any of the names of any voters objected to as required by section fifty of the act to establish and regulate elections. As to the second or special notice, it was objected that the service thereof was illegal; that the common law mode of serving a notice was by personal service, that is, either by reading the notice or delivering a copy thereof to the person to be notified; and that the common law mode of service in this matter was a 'provision by law' within the intent and meaning of section twenty-two of the fifth article of the practice act, and that the said twenty-second section and following sections did not apply, and therefore there was no legal service of said special notice. The court decided that the provisions in section twenty-two of the above mentioned article were applicable; that if such a construction be given to said section twenty-two, there would be no grounds for that and the other sections in relation to the service of notices upon which to stand; and that the true construction of the twenty-second section is, that all notices may be served in the manner provided in the section immediately following the twenty-second, unless otherwise provided by statute law; that the services of the notice made by Samuel Simmons and Stephen Rice were good *prima facie*, and the service made by Edward J. Castello was bad, because it did not state that the copy was delivered at the *usual place of abode of Cerre*.

"It was intended on the part of Castello that Cerre had by his appearance waived all right to question the legal suffi-

ciency of the notices, as well as the service thereof; that as evidence of such waiver he had given Castello a counter notice of contest six days before the term of the court; and that he had appeared there in court by filing his motion to quash. The court was of the opinion that these facts did not amount to a waiver; that a party might very well be considered in court for the purpose of quashing a writ or the service thereof and not for any other purpose; that Cerré was *compelled* to give his counter notice six days before the term of the court or forfeit his right to contest on his part; and that the mere doing of that which he was compelled to do or endanger his right, ought not to be construed into a waiver; that it seems to be the object of the statute to give the notice a double operation, that is, to bring the party into court and to set forth and advise the court of the grounds of contest; that the notice required by the statute seemed designed to stand in lieu of and perform the functions of a writ and petition in an ordinary suit; and it would seem to be just as unreasonable to say that the contestee could not appear in court and object to the notice upon the ground that it is insufficient in law, as to say that a defendant could not appear in court and demur to a petition in an ordinary suit.

“The right of a party to contest an election is a creature of the statute, and unless he have saved that right by giving notice as required by the statute, it must be conceded it has become forfeited, and he will not be allowed to assert it over the objections of the party whose election he seeks to contest. And thus arose the question whether Cerre had been notified by Castello as required by the act concerning elections. The notice served on the 17th of August is insufficient because it is too general, and because it failed to specify any grounds upon which the contestant intended to rely; nor did it specify any objection to the qualification of any voters, nor did it give their names as required by the fiftieth section. And as to the special notice which was served on the 18th of September, it was objected that that was not

served within twenty days after the official count of the votes as required by the fifty-fifth section.

"If it be true that a correct reading of the statute requires two notices to be given by the contestant to the contestee—one to be a general notice under the fifty-fifth section, which is to be served within twenty days after the official count of the votes, without regard to the space of time between the election and the term of the court at which the contest is triable; and the other, a special notice under section fifty, specifying the grounds of the contest, which is to be served fifteen days before the term of the court at which the contest is triable, and without regard to the space of time between the election or the official count and the term at which the contest is triable, then there was error in sustaining the motion to quash and in dismissing the proceedings. But if the statute requires one notice only, which must set out the grounds upon which the contestant intends to rely and which must be served within twenty days after the official count and fifteen days before the term of the court at which the contest is triable, it is submitted that the action of the court in sustaining the notice to quash was correct, because no such notice appeared to have been given; and this was the result at which the court arrived upon the reading of the statute adopted by it. In the vindication of which the following remarks are respectfully submitted.

"And first, it may be proper for me to say that two notices for one and the same purpose might properly be regarded as a work of supererogation if not an anomaly in the law, and that the statute ought not to be read consistently with any such idea unless two notices are provided for expressly or by irresistible implication. I am aware that an argument is made in favor of two notices, based upon notions of equity towards the contestee; that the first or general notice is simply to inform him his election will be contested, which is to be served upon him within twenty days after the official count; and after that and fifteen days before the term of the court at which the matter is triable, he is to receive the

special notice informing him of the specific grounds. In answer to this argument, it may be said that in the working of the statute it is by no means certain that the general notice will be received before the special one, as I shall hereafter endeavor to demonstrate ; but suppose that would be so invariably, it seems clear to me that such a mode of proceeding would be greatly to the disadvantage of the contestee. Suppose, if you please, that the contest be instituted in a county in which the first term of the court is six months after the election. The contestee receives the general notice within twenty days after the count, which really imparts no useful information to the contestee, because it specifies nothing. He may know that an attempt will be made to strike him ; but with what or when the blow is intended to be planted he has no reliable information until within fifteen days of the time when the cause may be called for trial ; and the contestee is compelled to give his counter-notice six days before the term of the court. The result of which is that the contestant has five and a half months to fix up the pleadings and arrange the facts of his case under the blind of a general notice before he is compelled really to show his hand, while the contestee has only nine days to prepare what case he may have to present against the contestant. It would indeed seem to me that such a construction would not work very equitably towards the contestee. Again, if the above constructions requiring two notices be equitable towards the contestee, and that is the idea which is to govern us in reading the statute, it is contended there is a stronger claim upon that ground for the construction requiring one notice only. If a notice be given specifying the grounds set forth in section fifty and served within twenty days after the count and fifteen days before the term of the court, he has all the information the two notices can give, and it may be at a much earlier stage of the proceedings.

“Secondly. Does the section fifty-five in itself considered provide expressly or impliedly that the contestant shall serve a notice upon the contestee independent of the notice pro-

vided for by the section fifty; or does the fifty-fifth section merely operate as a limitation of the notice provided by the fiftieth section? If the fifty-fifth section be regarded merely in the light of a limitation or as an additional regulation of the notice provided for by the fiftieth section, no difficulty of importance is perceived in the reading the statute, so far as this question is concerned, so as to give entire unanimity and harmony to the various sections bearing upon the subject. It will be admitted that the proper rule in construing a statute is to take the sections or parts of it bearing upon the same subject matter and read them all together; and if any portion of the statute, by reason of its phraseology, is capable of bearing two constructions, one of which will cause the various parts to harmonize and have a practical operation, and the other will cause a conflict on the working of the various provisions, and result in impracticabilities, we are compelled to adopt as the legislative will that construction which will give harmony and effect to the statute in all its parts. Let us suppose, for the sake of argument, that the fifty-fifth section provides affirmatively for a notice distinct from and independent of that provided for by the fiftieth section, and see what would be the inevitable result of such a construction. If the fifty-fifth section provides affirmatively for a separate notice, the contestant, as a matter of absolute right, has twenty days after the *official count of the votes* in which to serve it, and this right can in nowise be affected by the date of the election or the time of the term of the court at which the contest may be called for trial. Now it will be seen that the fifty-first section requires the contest to be tried by the court at the first term held twenty days after the *election*; and if the election of any county officer other than sheriff or coroner be contested, by the sixtieth section, it shall be tried at the first term held fifteen days after the election, unless continued for cause or by consent. Let me ask, how can it be that the contestant has an absolute right twenty days after the *official count*, (which must be some day or two after the election,) to serve the gen-

eral notice under the fifty-fifth section, when he may be forced into a trial of contest before the court under the fifty-first section or sixtieth in fifteen or twenty days after the *election*? It seems clear that the contestant can not in the nature of things be entitled as a matter of right to have twenty days after the *count* to serve his general notice, when he may be forced into trial in fifteen or twenty days after the election, and that such a construction must necessarily bring the fifty-fifth section in conflict with sections fifty-one and sixty, which regulate the time of trying the contest.

“There is another test to which I wish to subject this argument, which contends that two notices are required. The statute under which this proceeding is had is general; its operation is co-extensive with the limits of the state; and, in our endeavors to read it so as to carry out the will of the legislature, it is deemed proper and fair to consider its operation beyond the limits of St. Louis county. There are in this state some eight or ten counties in which the fall term of the circuit court commences on the first Monday in September. In order that we may apply this test, let us suppose that the matter of this contested election had arisen in any one of those counties. The election was held on the 2d day of August, and the official count was made on the 7th of the same month. The first Monday in September came on the 6th day of that month. Now agreeably to the argument, the contestant has until the 27th of August to serve his general notice under the fifty-fifth section. By the fiftieth section he is compelled to serve his special notice fifteen days before the 6th of September, which would require it to be served on the 21st of August, and thus it is shown that the special notice under section fifty would be served six days before the general one under section fifty-five. There are a number of other cases which might be presented if deemed necessary, which show the same result of such a construction of the statute.

“Third. Having attempted to show that the fifty-fifth section does not provide for an independent and separate

notice, because the statute in all its provisions bearing upon the same subject matter can not be read consistently with such a construction, let us now endeavor to examine the phraseology of the fifty-fifth section in order to gather what light we can tending to show the will of the legislature in framing it. It is in these words: 'No election of any county officer shall be contested unless legal notice of such contest be given in writing to the opposite party within twenty days after the votes are officially counted.' It will be observed that this section affirms nothing. It is simply a conditional negative. Unless legal notice of such contest in writing be given within twenty days after the count the contest is prohibited. What are we to understand to be the meaning of the words 'legal notice of such contest?' What is a legal notice of a contested election? What must be the form and contents of a document to make it come up to the standard of a legal notice? I might, perhaps, more properly ask, where can the standard of a legal notice of a contested election be found? I am not aware that there is any such thing as a legal notice of a contested election at common law, and therefore we can get no aid in our inquiry from that quarter. And it is respectfully submitted that the proposition is beyond solution, unless we conclude that the legal notice of contest mentioned in the fifty-fifth section refers to the notices provided for by sections fifty and fifty-seven, and in this view the solution is easy. If the legislature intended by the fifty-fifth section to make it incumbent upon the contestant to give the contestee a common notice which would simply inform him that his election would be contested, why did they employ the technical and guarded language of "legal notice in writing of such contest?" It seems to me that, as the legislature have given us in sections fifty and fifty-seven the requisites and the standard of a legal notice of a contested election, by the use of the language employed in the fifty-fifth section they simply mean the statutory notices provided for in sections fifty and fifty-seven.

"In pursuance of the views which are herein endeavored

Castello v. St. Louis Circuit Court.

to be expressed, the court came to the conclusion, 1st, that the general notice served on the 17th of August was insufficient in law, because it specifies no grounds upon which the contestant intends to rely as required by the fiftieth section of the act concerning elections; 2d, that the notice served on the 18th of September was insufficient in law because it was not served within twenty days after the official count as required by the fifty-fifth section; 3d, that the legal effect of both papers, with the service thereof, as appeared to the court, was insufficient to constitute legal notice to the contestee as required by said act; 4th, that the fifty-fifth section absolutely prohibits the court from trying the contest upon its merits, because legal notice of such contest did not appear to have been given.

“Respectfully, &c.,

“J. R. LACKLAND.”

S. T. & A. D. Glover and Leonard, for Castello.

I. The mandamus should issue and be made peremptory. The proceeding to contest the election of a sheriff under our statute is a proceeding not according to the course of the common law. No appeal or writ of error lies upon the record in such case. Unless therefore the case is one which the supreme court will revise through *certiorari* or *mandamus*, there is no remedy for any wrong that may be committed by a circuit judge in such cases. If in any case not proceeding according to the course of the common law, the statute law is departed from and a judgment erroneously rendered against a party, whose rights can only be restored by annulling that judgment, since no other remedy exists, the wronged party may have a *certiorari* and thereby quash and annul the whole proceeding. (2 Mass. 441; 5 Mass. 517; 2 Greenl. 165; 8 id. 163; 1 Yerg. 92; 3 Johns. 23; Walker, 112; 16 Johns. 49; 2 Caines, 179; 2 S. & R. 363; 4 Watts, 305; 4 Rawle, 366; 2 Williams, 592.) If in such a case the party's rights can only be secured by requiring the judge to go forward and execute in his behalf some provision of the

statute which he has refused to execute, the remedy is *mandamus procedendo*. If the justices of quarter sessions refuse to entertain a complaint under an erroneous supposition that they have no jurisdiction of it, or if the hearing be illusory, mandamus lies to command them to do their duty in order to prevent a defect of justice. (Tapping on Mandamus, 279, 280.) Where the quarter sessions, on appeal, decide a point preliminary to the case and refuse to hear it further, no mandamus lies, if the preliminary point is matter of fact only; but if the point involved is one of practice or matter of law, then a mandamus to hear lies. (Tapping, 280-1-2; see also 3 Ad. & El. 744, 985; 5 Barn. & Ad. 597; 2 Williams, 592; 5 Pike, 50; 4 Eng. 240; 7 Eng. Law & Eq. R. 390; 7 Cranch, 577; 1 Eng. L. & Eq. 291; 17 Ill. 128; 14 Ill. 153; 29 Ala. 72; 10 Wend. 293; 4 Wend. 212; 12 Wend. 246; 8 Cow. 133; Hardin, 173; 20 Ala. 334; 5 Engl. 246; 6 Florida, 279; 7 Ala. 460.) The judge of the circuit court had no discretion. His duty of trying the cause, of docketing it and proceeding with trial, was ministerial simply. But mandamus lies to compel performance of judicial as well as ministerial duties. If the duty be judicial, the mandate will be to compel the exercise of the official discretion or judgment without directing the manner of proceeding. (21 Pick. 258.) In the case at bar there has been no use of the judicial discretion. (See 5 Pick. 50.) The result of the cases may then be stated to be, that where an officer or court is requested to perform an act, either administrative or judicial, and they decline acting for some supposed defect in a preliminary matter necessary to give them the power of acting in the premises, this court, in the exercise of its superintending control over all inferior officers and jurisdictions, must of necessity look into such matter and award or refuse a mandamus according to the rights of the parties; otherwise, in all such cases, there would be a defect of justice; and the two cases cited (2 Williams, 592, and 3 Q. B. 744,) seem to proceed on this principle. If a court or officer proceeds to discharge the

duty imposed on them, and commit any error or irregularity in discharging the duty, the effect of the error or irregularity upon the rights of the parties may be corrected by writ of error or of *certiorari*, as the one or the other shall be otherwise applicable, unless the judgment of the court or officer is made final in the matter. But if they refuse to act at all, will not enter upon the discharge of the duty, although for some supposed defect in a necessary preliminary proceeding, this court will compel them by mandamus to act, and restrain them by prohibition when they exceed their authority. In this way the whole ground seems to be covered, and the due administration of the law enforced, and the rights of all persons protected by this court.

II. When the court quashed the proceeding for want of proper notice, all questions of notice and service had been waived by steps taken in the cause on the merits. Cerre had served his counter notice. The parties were fully at issue on the merits. Castello had prepared his case on the merits. Cerre's notice left him no discretion. Is it proper in such case to treat the question of notice as open? (See 2 Engl. 552; 6 How. 605; 1 Morr. 21, 223, 113; 10 S. & M. 563; 2 Scam. 462, 263; 17 Verm. 531; 8 Shepley, 467.)

III. Mr. Castello fully complied with the law in giving notice. The notices given were sufficient.

Hill and P. F. Thomas, for Cerre.

I. A mandamus will not lie in the present case. (See 2 T. R. 259, 484; Cole on Crim. Inf. 137, 147; Burr. 1454; 4 T. R. 699; 6 Ad. & El. 349; 1 N. & P. 474; 7 Ad. & El. 215, 419, 966; 11 Ad. & El. 512; 10 Pick. 244; 11 Pick. 189; 18 Pick. 443; 19 Pick. 298; 2 Pet. 567; 6 Pet. 216, 661; 7 Pet. 637; 2 Ired. 423; 3 Dall. 42; 2 Bibb, 573; 8 B. Monr. 651; 2 Ired. 430; 1 Pike, 11; 1 Ala. 15; 6 Ala. 511; 18 Wen. 79; 8 Pet. 291; 1 Den. 644, 679; 20 Wend. 663; 2 Hill, 363; 21 Wend. 20; 3 Johns. cas. 79; 5 Hill, 616; 1 Cow. 417; 1 Pet. 567; 13 Pet. 279; 7 Pet. 634; 1 Green. 97; 1 Halst. 157; 20 Barb. 302; 12 Gratt.

Castello v. St. Louis Circuit Court.

266; 26 Ala. 133; 4 Texas, 329; 9 Texas, 250; 3 Mich. 437; 10 Gratt. 650; 25 Ala. 72; 14 Ark. 368; 21 Ala. 772; 1 Ohio, State, 30; 14 How. 24; 6 Texas, 457; Beawe's, Abr. tit. Mandamus; 5 Barn. & Ad. 1011; 1 Eng. Law & Eq. 291; 4 B. & Ald. 300; 3 Dall. 42; 17 How. 284; 14 Pet. 497; 6 How. 92; 3 Pike, 427; 3 Binn. 273; 5 Halst. 57; 2 Harr., N. J., 355; 2 Cow. 458, 479; 7 Cow. 363.)

NAPTON, Judge, delivered the opinion of the court.

Upon the facts disclosed in the petition in this case for a mandamus upon the circuit court, a majority of this court determined that a conditional mandamus should be awarded, and it was accordingly so ordered. This determination was based upon the principle that where an inferior judicial tribunal declines to hear a case upon what is termed a preliminary objection, and that objection is purely a matter of law, a mandamus will go, if the inferior court has misconstrued the law. The cases of the King v. The Justices of the First Riding of Yorkshire, 5 Barn. & Adol. 667, and Rex v. The Justices of Middlesex, 5 B. & Ad. 1113, The King v. Hewer, 3 Ad. & Ellis, 715, and Regina v. The Recorder of Liverpool, 1 Eng. Law & Eq. R. 291, are believed to be conclusive upon this point so far as the English authorities go; and our attention has not been directed to any American cases conflicting with this view of the law. If the circuit court declined to go into the merits of the case because the party complaining had not given the notice required by the statute, that was a preliminary objection upon a point of law which this court can review upon a writ of mandamus; and if the circuit court called for a notice which the statute did not require, the mandamus ought to be made peremptory.

It is not deemed important to go into any extended examination of this question, since upon the return to the conditional mandamus by the circuit court, we were satisfied that the construction which that court gave to the statute was correct. The fifty-fifth section of the election law (R. C.

Castello v. St. Louis Circuit Court.

1855, p. 706) provides that a legal notice in every contested election of a county officer must be given within twenty days after the official count. This is the longest period allowed for such notices. It may be requisite to give them before the lapse of twenty days, but they can not be deferred beyond that period in any case. The essential constituents of the notice in the case of sheriffs are stated in the fiftieth section. The notice in this case was not given within twenty days after the official count, and we are therefore of opinion that the peremptory mandamus be refused.

SCOTT, Judge. At the last August election Michael Cerre and James Castello were candidates for the office of sheriff in St. Louis county. Cerre, according to the count, having received the greater number of votes, was declared to be elected. A certificate of election was delivered to him and he qualified according to law. Castello contested the election of Cerre and gave him what he supposed to be the notice required by the statute. The cause coming on to be heard in the circuit court, the notice of the contest was produced in evidence, and, Cerre objecting to its sufficiency, the court ruled it out, and, being of the opinion that the notice required by the statute had not been given, dismissed all further proceedings in the cause. Upon this state of facts, Castello, assuming that no appeal or writ of error would lie, applied to this court for a mandamus to compel the circuit court to proceed with the hearing of the cause. This application raises the sole question whether, according to the principles of law, a mandamus is the appropriate remedy to attain the end sought by Castello.

At this stage of the pleading we have nothing to do with the correctness of the decision of the circuit court. We do not say whether it was correct or incorrect. It will not be denied but that Castello, in his contest, in order to succeed, must show two things at least; first, that he gave the notice required by law; secondly, that he received the greater number of legal votes. It will not do to prove one of these re-

Castello v. St. Louis Circuit Court.

quirements. He must prove both. The proof of one without the other is as fatal in law as if neither had been proved. This, it is presumed, will not be controverted. If then the circuit court proceeded so far in the hearing of the cause as to determine that the legal notice had not been given, was not the controversy then terminated, and terminated, too, on its legal merits? Cerre had the office. It was competent to the general assembly to make his certificate of election final and conclusive as to his right to the place. This however has not been done. The law has given a right to his unsuccessful opponent to contest his election. This has not been granted absolutely, but on a condition. That condition is that he shall give the notice of his intention to contest required by the statute. Now if he omits to do this, he must fail in his contest. The circuit court has heard the cause and has determined that the required notice had not been given, and, being of that opinion, very properly dismissed all further proceedings; for, as the contestant had not given the necessary notice, if the court, after having heard the objections to the notice, had gone on with the trial, and after receiving the whole evidence had been of the opinion that Castello had received the greater number of legal votes, yet if it had been of the opinion that he had neglected to give the requisite notice, it would have been bound to have given judgment against him. Where, then, is the use in commanding the court to proceed with the trial of the cause? What will it profit the contestant? After expending weeks, perhaps months (judging from the record), in trying it, must not the same judgment necessarily be entered that has been already given in the cause? Was it ever heard that after a cause had been tried on its merits in the proper tribunal, that a mandamus would lie to correct the errors of the judgment? Authorities will not be cited on this point. The learning on this subject is too trite to be paraded in citations. Is there a lawyer in this state who, on a point like this being decided against his client, would not take a bill of exceptions to the opinion of the court and bring the case here by appeal or

Castello v. St. Louis Circuit Court.

writ of error? But it is said that no appeal or writ of error will lie in this proceeding. Why not? If the law is so, is it because the statute did not intend that, in cases of contested elections tried by the circuit courts, there should be a review of their judgments, that they should be final? If the statute did contemplate that such proceedings should not be reviewed on appeal or writ of error, that the judgment of the circuit court should be final, did it ever intend that the same thing should be done by a mandamus, thus prostituting that process to a purpose to which it was never before applied? Would not an appeal or writ of error be the most easy, the least expensive, and the most appropriate means for effecting a review; and can we suppose that the legislature would discard them and sanction a mode of correcting the errors of judgment of an inferior tribunal that had never before been applied to such a purpose? But see how a mandamus works as a process for reviewing the judgment of the circuit court. If a review is open to one party, it ought also be to the other. Now if the court had overruled the objections of Cerre to the sufficiency of the notice, and had gone on with the cause, will any body pretend that Cerre could have come here for a mandamus on the circuit court; would not such an application have been laughed out of the court room? What sort of a process is this, then, which would be substituted for an appeal or writ of error—a one-sided process, free to one party to a cause and not to the other?

It may be said that the circuit court, in trying a contested election, not proceeding according to the course of the common law, is the reason that an appeal or writ of error will not lie upon its judgments in such cases. If such be the case, would therefore the nature of a writ of mandamus be changed? Could it therefore be made to answer a purpose to which it is not adapted and for which it was never intended? The judgment in this case is a final one in whatever way it may have been entered in the court below; and its errors, if any there be, can not be remedied by a mandamus, for it is

admitted on all sides that a mandamus can not correct the judgment of an inferior court even though it be erroneous. It is most manifest that this court can not grant the writ asked for, or at least no end whatever can be obtained by granting it, unless it is prepared to hold that Castello can oust the present incumbent without giving any notice of his intention to contest his election; for if the notice be necessary, then its existence is of the legal merits of this controversy; and the court below having decided that it is insufficient, there is an end of this contest, at least so far as it can be affected by the process of mandamus—a process that can require an inferior tribunal to proceed with a cause and enter a judgment on it, but can never interfere with the judgment after it has been entered.

Recent English authorities on the subject of writs of mandamus have been cited, and it is maintained that they furnish grounds for the opinion that the writ of mandamus is the appropriate remedy under the circumstances of the case before us. In *Tapping on Mandamus*, (p. 280,) it is said, where the quarter sessions on appeal decide on a point preliminary to the whole case, or to the reception of a particular piece of evidence, that they will not hear the cause further, their decision is conclusive if the point involve matter of fact only, but otherwise if it raise a mere point of practice, which the court of king's bench can perceive to be a point of law; in the latter case a mandamus to hear, &c., will be granted; in the former, not. On the same page it is said that the ordinary practice of the court of king's bench is to grant the writ of mandamus to command magistrates or the quarter sessions to hear and determine or give judgment in cases within their jurisdiction, where they have refused altogether to exercise it; *but no instance can be cited in which the court of king's bench has granted a mandamus to compel them to do a specific act, as to come to any particular decision, for, after they have once decided an appeal, &c., even erroneously, or under a mistake of law, such decision is final and conclusive.* It may be that we do not comprehend

Castello v. St. Louis Circuit Court.

what is understood by the terms "point preliminary" in the above citation. In looking over the cases, it will be seen that the English judges themselves complain that they have been misunderstood. It should be no surprise then that they should mislead those who are so remote from the tribunals in which they are employed. But there is one case among the recent English decisions which serves to show, negatively at least, what is not meant by it, and it is a case which decides a point identical with that involved in the application before us. It is the case of *Rex v. The West Riding of Yorkshire Justices*, 5 Barn. & Adol. 667. There is another case of the same title, in the same book, at page 1003; but the case to which reference is made is at page 667. There a statute required that ten days' notice of an appeal should be given. After the appeal had been taken, it was, in the language of the English books, respited to one place and then to another. The cause coming on to be heard, it was objected that no notice of the respited appeal had been given, and the court being of the opinion that such a notice was necessary, refused to hear the cause. A mandamus was applied for to the king's bench, and the court was of the opinion it should be granted. The judges said that the notice of the respited appeal was not required by any rule of law or practice of the court, and that the justices had no authority to exact it from the appellant. But they said that if the inferior court had decided on the original notice of appeal—a notice required by statute—they would not have interfered nor granted a mandamus. Reference is made to the opinions of the judges, not to the syllabus of the case. That case is on all fours with this. There the court held that if a statutory notice was adjudged insufficient by the inferior tribunal, they would not control its judgment by a mandamus. So in the case before us, the inferior court has declared that a notice required by statute is not sufficient; then, if the English authority is to have any weight, we can not issue the writ of mandamus. This case is valuable to show what idea is conveyed by the terms "point preliminary." It shows that

Grant v. Steamboat Maria Denning.

where a statute requires a notice and that notice is adjudged insufficient by the inferior tribunal, its judgment will not be controlled by mandamus. It is not deemed necessary to review the other authorities cited, as none of them are found to overrule or explain away the case to which reference has been made.

It is not intended that any thing contained in this opinion should be regarded as an expression of our views on the question whether a writ of error or appeal will lie in this case. It is not true that a writ of mandamus will lie in all cases where there is no other remedy. Before a party is entitled to a mandamus or any other writ, he must have a right. Whether the contestant has any right to a review of the judgment of the circuit court may be a question and is to be shown, and if such right is shown, the writ of mandamus can not be made to assume the office of a writ of error or appeal. If the law contemplated that the action of the circuit court in determining contested elections should be reviewed, then there can be no reason whatever in law for not resorting to those means by which the errors of judgment in that court are corrected in all other cases.

In my opinion, the mandamus ought to be refused.

GRANT, Respondent, v. STEAMBOAT MARIA DENNING, Appellant.

1. A. was employed as a fireman on a steamboat for a trip from St Louis to New Orleans and back at certain agreed wages per month; after the steamboat had proceeded a short way on her trip to New Orleans, A. was discharged and put ashore without cause; the trip lasted twenty-seven days, during which A. obtained employment elsewhere for about eight or nine days. *Held*, that A.'s claim to relief might be enforced by suit against the boat to recover wages for the trip; that this claim was a lien on the boat and might be enforced as such in an action under the act concerning boats and vessels; that A. might recover wages up to the completion of the trip, deducting any wages he may in the mean time have earned on any other boat.

Grant v. Steamboat Maria Denning.

Appeal from St. Louis Law Commissioner's Court.

The facts sufficiently appear in the opinion of the court.

Decker, for appellant.

I. It is not in contemplation of the law to give a lien upon a boat unless the work was actually rendered on board the same. (See *Blass v. The Robert Campbell*, 16 Mo. 266; *Jones v. Steamboat Morrisett*, 21 Mo. 142.)

Killam, for respondent.

I. The court committed no error in refusing to dismiss. (2 Pick. 267, 232; 19 Pick. 349, 528; 12 Metc. 286; Sedg. on Dam. 216, 223; 8 Georg. 190; 25 Verm. 206; 11 Verm. 273; 2 Swan, 605; 9 Gill, 288.)

NAPTON, Judge, delivered the opinion of the court.

This was a suit against the boat for wages for one trip as fireman, at the rate of thirty-five dollars per month. It appeared that the master of the boat shipped the plaintiff at St. Louis for a trip to New Orleans and back at thirty-five dollars per month. About fifteen or twenty miles below St. Louis the plaintiff was put ashore for the alleged reason that the boat had too many men. The trip lasted twenty-seven days; during which time the plaintiff got employment elsewhere for about eight or nine days. A motion to dismiss the suit was made on the ground of a variance between the proof and the demand, and because the case made out did not create any lien on the boat.

We do not consider this case as involving any question as to the measure of damages in ordinary cases of a wrongful discharge of a servant before the expiration of his term of service. The subject of mariners' wages is governed by rules growing out of the peculiar nature of the service, and appropriately belongs to courts of admiralty, though undoubtedly actions at common law may be maintained for breaches of the contract between the master and his crew. The only question presented by this record is, whether the evidence

Grant v. Steamboat Maria Denning.

submitted made out a claim which, under our statute concerning boats and vessels, was a lien on the boat; and upon this point our opinion is that the decision of the law commissioner was right. In the case of the city of London, 1 Wm. Rob. Adm'r, R. 88, Dr. Lushington permitted a suit for wages where the seaman was discharged after the articles had been signed but before the voyage commenced, treating the case of an unjustifiable discharge during the voyage as one where the jurisdiction of the admiralty was indisputable. The case of Emerson v. Howland and others, 1 Mas. 45, was a suit for wages in a court having admiralty jurisdiction, and the claim was based upon an illegal discharge in a foreign port, and full wages were claimed up to the return of the vessel to this country. Judge Story observed that the courts of common law usually sustained such claims in a special action on the case for damages for the illegal discharge, but that the admiralty did not hesitate to pronounce for compensation in a *simple suit for wages*. The frequent occurrence of suits of this description in the courts of admiralty jurisdiction in the United States may be seen by reference to the second volume of Peters' Admiralty Reports, where the opinions of Judge Peters and Judge Hopkinson and some notes by the former judge and subsequent editors consider the practice well settled in this country. (The Hazard, p. 384; The Gloucester, p. 403; note, p. 406; The Roloff, p. 428.)

Our statute provides for a lien in the case of "wages due to hands or persons employed on board such boat or vessel for work done or services rendered on board the same." This suit is for wages, and there is no dispute that some services were rendered which fall within the meaning of our statute. In the case of Blass v. The Robert Campbell, 16 Mo. 266, the action was not for wages, but for damages for unlawfully forcing the plaintiff to go ashore at a remote point on the river among tribes of unfriendly Indians, where there was likely to be no opportunity of getting away and no means of

Grant v. Steamboat Maria Denning.

support at the place. The cases of *Loft v. Steamboat Envoy*, 19 Mo. 476, and *Jones v. Steamboat Morrisett*, 21 Mo. 142, are upon the point of the character of the services which come within the meaning of our statute; but in this case no doubt can be entertained that the services of a fireman are within the statute. The illegal discharge we have seen does not have the effect of driving the party to his action at common law for damages, but he may still sue for wages and the courts of admiralty will give him such wages as, under the circumstances, will indemnify him.

It will be observed that no point was raised in this case as to the proper measure of damages. No instruction was asked upon the trial. Chief Justice Abbott, in his work on shipping, states the law to be, that if a seaman is wrongfully discharged during a voyage, he is entitled to wages up to the successful termination of the voyage, deducting any wages he may in the mean time have earned in any other vessel; and this appears to have been the rule which guided the law commissioner in his verdict in this case. But Judge Story, in the case of *Emerson v. Howland* and others, 1 Mason, 45, permitted a recovery of wages only up to the time when the mariner returned to his place of embarkation, and not until the end of the voyage of the vessel from which he was discharged. He held, however, that there was not and ought not to be any fixed rule for all cases, but that each should be governed by its own circumstances, keeping, all the time and in every case, in view to allow a compensation which shall furnish a full indemnity for the illegal discharge. It is obvious that many of the rules adopted by courts of admiralty in reference to sea-going vessels and mariners may not be applicable, without modification, to our steamboats and their crews, making short trips of from one to four weeks. We see nothing unreasonable in the application of the rule laid down by Chief Justice Abbott in the present case, to allow wages for the trip and deduct what was earned in the mean time. Whether such a rule ought to be applied under all

Dermody v. Steamboat Maria Denning.

circumstances is another question not necessary to be determined here. As we are satisfied that the claim was a lien, and the propriety of the exact sum allowed the plaintiff is not a matter for review, we shall affirm the judgment.



DERMODY, Respondent, v. STEAMBOAT MARIA DENNING, Appellant.

GRANT, Respondent, v. STEAMBOAT MARIA DENNING, Appellant.

1. A justice of the peace rendered a judgment by default against a defendant, and allowed an appeal although the defendant made no motion to set the default aside, and the justice filed a transcript of his proceedings before the proper appellate tribunal. Afterwards, and within the time allowed by law, the defendant moved the justice to set aside the judgment by default; this motion the justice refused to entertain, as also a further application for an appeal. *Held*, that the defendant was entitled under these circumstances to have the cause tried upon the merits in the appellate court.

Appeal from St. Louis Law Commissioner's Court.

These were suits before a justice of the peace to recover wages alleged to be due plaintiffs for work done on the defendant. The defendant not appearing, judgments by default were rendered against the defendant on the 19th of September, 1857. On the same day, without first making motions to set aside the judgments by default, appeals were prayed and granted and affidavits and bonds were filed. The transcript and papers were filed in the St. Louis law commissioner's court. Afterwards, on the 25th of September, the defendant moved the justice to set aside the judgments by default. The justice refused to entertain these motions or to make any entry of them in his docket. On the 28th day of September, 1857, defendant again appeared before said justice and tendered him affidavits for appeals with appeal bonds and prayed the justice to allow appeals. The cause was docketed in the law commissioner's court. A motion was

Dermody v. Steamboat Maria Denning.

made in each cause in the following form: "The defendant therefore prays this court that a rule may be granted requiring the said justice to amend his return of said cause to this court, and that, should he fail to obey said rule, he may be compelled thereto by attachment." The law commissioner's court overruled these motions, and dismissed the appeal.

Decker, for appellant.

I. The court erred in refusing the rule and attachment upon the justice. (R. C. 1855, p. —, ch. 90, art. 9, § 14.) The appeal first taken was illegal and void. The first appeal, or rather the first attempt at an appeal, being nugatory, the party aggrieved stood precisely as if no such effort had been made. He had a right to come in at any time within ten days after said judgment by default and move to set the same aside, and within ten days after such motion file his bond and take his appeal.

Kellam, for respondents.

I. The jurisdiction of the justice ceases after the filing of the transcript and papers in the appellate court. The appellate court is then possessed of the cause.

NAPTON, Judge, delivered the opinion of the court.

These cases are precisely alike. We do not perceive any good reason for the refusal of the law commissioner to hear and determine them upon their merits. If the first appeal was valid, the cases ought to have been heard; if that appeal was regarded as a nullity because taken before a motion to set aside the judgments by default had been made, then the justice should have heard the subsequent motions to set aside the defaults, which were made in time and followed by applications for appeal; and as the justice refused each of these applications, the law commissioner should have made such orders as would have enabled the appellants to obtain trials of their cases upon the merits.

The judgment is reversed and the cause remanded; the other judges concur.

WILEY *et al.*, Defendants in Error, v. HOLMES, Plaintiff in Error.

1. A. and B. gave to C. their joint promissory note dated and payable at the city of New York. By the law of the state of New York at the date of the note, upon the recovery of a judgment against one of two joint debtors there was a merger of the debt and no action could afterwards be maintained against the other joint debtors. C. instituted suit upon said promissory note in the state of Louisiana against A. alone, and recovered judgment. *Held*, that this judgment against A. was no bar to an action on the note against B. alone in the courts of this state.

Error to St. Louis Court of Common Pleas.

This was an action on the following promissory note :
“\$20,202.97. New York, March 19, 1849. Twelve months after date, we promise to pay to the order of L. M. Wiley & Co., at their office in New York, twenty thousand two hundred and two 97-100 dollars, value received. [Signed] Bloomer & Holmes.” The defendants set up as a defence that by the law of New York, to which the note was subject, the promise and obligation of the note were joint and not several; that a judgment of a court of record had against one of the makers thereof alone was a merger and extinguishment of the contract of the note as to the other maker thereof; that in a suit instituted by the plaintiffs in the fourth district court of New Orleans, Louisiana, upon said note against Bloomer alone, a judgment was rendered against him alone on the 25th of January, 1855. At the trial the plaintiffs introduced the note in evidence. The following extract from the bill of exceptions contains all the evidence introduced touching the judgment recovered in Louisiana :
“The defendant gave evidence showing that the law of the state of New York, when said note was made, touching joint contracts, was the English common law, and also read article first of title six, on pages 299 and 300 of volume two of second edition of the revised statutes of New York, published in 1836, which may be read in supreme court. He

also gave in evidence a judgment recovered by the plaintiffs prior to the commencement of this suit, to-wit, on the 25th of January, A. D. 1855, against Robert Bloomer, upon said note, in a suit instituted by them against said Bloomer alone in the fourth district court of New Orleans, in the state of Louisiana, the same being a court of record." The cause was tried by the court without a jury. The court, at the instance of the plaintiffs, gave the following instructions or declarations of law: "1. If the court believe from the evidence that a judgment was obtained by the plaintiffs against Robert Bloomer on the note sued on in the state of Louisiana, such judgment is no bar to a suit on said note against Artemas L. Holmes in the state of Missouri. 2. Although the note sued on was drawn in New York and was payable in New York, and although the said plaintiffs have obtained a judgment in the state of Louisiana against Robert Bloomer, one of the makers of said note, such judgment is no bar to a recovery by the plaintiffs in the state of Missouri on said note." The court refused the following instruction asked by the defendant: "If the court believe from the evidence that the law of contracts of the state of New York, at the time the note for \$20,202.97 first declared upon in the petition in this cause was made, was the English common law, and that, prior to the bringing of this suit, the plaintiffs had recovered a judgment in a court of record upon said note against Robert Bloomer as one of the makers thereof, then the court should find for the defendant as to this note."

The court found and rendered judgment for plaintiffs.

Todd, for plaintiffs in error.

I. The law of the place of the contract governs as to its nature, obligation and interpretation. (*Chitty on Contr.* 91; *Story on Conf. of Laws*, § 263.) Whether a contract is joint, or joint and several, is a question that concerns the nature and attributes of the contract and therefore its obligation. (*Chitty*, 98; *Story on Conf.* 263.) The contract of the note in this case is at common law joint. At com-

mon law, a suit, and a recovery therein of a judgment, in a court of record against one of two or more joint promissors is a merger and an extinguishment of the simple contract as to the others. (12 M. & W. 494; 1 Parsons on Contr. 12 note; Collyer on Part. § 757; 18 Johns. 460; 4 Johns. Ch. 566; 2 Mo. 66; Camden v. Clark, 2 Mich. 255; 7 Mo. 604; 13 Mass. 148.) The act concerning contracts (R. C. 1855, p. 351) can not affect the nature or obligation of contracts made and payable out of the state of Missouri as established by the law of the place of their making. The obligation of this contract is an entirety; not the obligation of the makers of the note, but of both. It is destroyed when it is destroyed as to one. (18 Johns. 479; 3 Sto. 651; 8 Wheat. 35; 1 How. 315; Sedgwick on Stat. & Const. Law, 652; 4 Mart. 312; 7 Mart. 210.) If good as a remedy against one, it does not follow that a judgment against one sued alone is not a merger. The merger follows notwithstanding. (2 Mich. 255.) Our statute does not say that a merger shall not follow from a judgment in a suit against one on a joint contract. If it did, it would change its nature; it would impair its obligation by dividing it. At common law a suit upon a joint contract must be against all. This was not founded upon a rule of practice merely, but upon the nature of the contract, because there was but *one* obligation. If one or more of the joint promissors were beyond the jurisdiction, the creditor might proceed to the outlawry of the absentees. Their goods might be seized. Nonresidents may be proceeded against here by attachment, or by notice by publication, or by service out of the state. The judgment in this case was rendered in Louisiana. It will be presumed that the common law, as understood in this state, prevails in Louisiana. (16 Mo. 110.) By the federal law judgments of sister states have the same credit, validity and effect in other states as in the states in which they are rendered. Said judgment is a bar to this suit.

Knox & Kellogg, for defendant in error.

I. The judgment against Bloomer in New Orleans was no

Wiley v. Holmes.

bar to this suit. (R. C. 1855, p. 351 ; 16 Louis. 544.) The law of the place where the contract was made can not control the manner of its enforcement in other states. Contracts, which at common law were joint, are here joint and several. No matter where the contract is made, one of several promissors may here be sued alone. Our statute does not impair the obligation of the contract. The reason why, by the law of New York, a contract is merged in a judgment against one of several joint debtors does not exist here. The judgment against Bloomer was not rendered in New York ; it was rendered by confession in the state of Louisiana. By the law of Louisiana, the judgment against Bloomer was no bar to a suit on the same contract against Holmes. (16 Louis. 544.)

SCOTT, Judge, delivered the opinion of the court.

This suit is founded on a promissory note executed to the plaintiffs by the style of L. M. Wiley & Co., payable in New York. The note was signed "Bloomer & Holmes"—a partnership composed of the defendant and Robert Bloomer—and dated "New York, March 19th, 1849." The defence was that by the laws of New York the note was a joint one, and that by the law of that state a judgment recovered against one of the parties thereto was a merger and extinguishment of the contract as to the other party, and that afterwards no action could be maintained upon it ; that in an action on the said note in the state of Louisiana a judgment was rendered against the said Robert Bloomer, one of the parties thereto, and therefore the contract was extinguished as to both of them. There was a judgment for the plaintiffs.

It is well settled that the law of the place of the contract governs as to its nature, obligation and interpretation, and also that it determines whether a contract is joint and several, or several. It is equally clear that by the common law, which is shown to be the law of New York on this subject, the note sued on is a joint one, and that, if a creditor sues one debtor on a joint contract and recovers against him a

judgment, the debt is merged in the judgment, and, in case the judgment is not satisfied, the creditor can not afterwards sue the other joint debtor or debtors. This was on the ground that the creditor by his own voluntary act had extinguished his debt as to one of the debtors, and a debt being extinguished as to one was extinguished as to all of the debtors. At common law, in case of joint contracts, the joint debtors, who could not be served with process, might be prosecuted to outlawry; in which event, the estate of the outlaw falling into the hands of the crown, the creditor might, by an application to the king, obtain satisfaction of his demand.

At common law, if one of the joint debtors died, although no suit at law could be sustained against the representatives of the deceased debtor, the cause of action surviving only against the living debtor, yet courts of equity, in such cases, afforded relief, and permitted the debt to be recovered against the representatives of the deceased debtor. And so far was this carried, that the representatives of the deceased debtor might be sued before any action was instituted against the survivor. (*Winter v. Innes*, 4 Mylne & Craig, 109.) This must have been on the ground that the creditor in nowise contributed to the act which deprived him of his action at law; and it shows that, although technically at law the remedy against one of the joint debtors may be lost, yet, where the creditor does no act himself which affects his remedy, that in equity and substantial justice it will be preserved for him. Thus it would seem that at the common law a destruction or taking away of the right of recovery in a suit at law against one of the joint debtors does not destroy all remedy against him and the surviving debtor, but that the right of recovery would remain as to all, but yet to be pursued in different forums. We are of the opinion too that it may be inferred from this that the act by which the creditor's remedy is to be merged or extinguished must be a voluntary one on his part. It must be his own act. If the act of God will not extinguish the creditor's right of recovery on a joint

Wiley v. Holmes.

demand, can the debtor by his own act do it? Can two debtors create a joint debt in a state where the common law prevails, and afterwards, even before the debt becomes due, by removing into different states, prevent a recovery of it, by setting up the defence, to an action against one of them, when only one can be sued, that by the law of the place where the contract was made it was a joint one, and the action on it must be joint and against both or it must fail. To a plea containing such a defence, would it not be a good replication that the defendant by his own act in removing to another state had prevented the institution of a joint action?

We do not see how the international law as to the nature, obligation and interpretation of contracts can affect this question. If both the debtors had remained in New York and whilst there the debt had been merged as to one of them by the voluntary act of the creditor, there might be some propriety in holding that this action could not be maintained. But as the defendants by their own act prevented the law of the place from operating on the contract, on what principle can they claim the benefit of that law which they have abandoned and renounced? It is the law of New York and of all other civilized states that a debtor shall not, by his own voluntary, unauthorized act, defeat the claims of his creditors. It is no answer to this to say that the parties must have contracted in contemplation of the possibility of such a state of things and should therefore have provided against it. Parties may contract in reference to a foreign law, or they may agree that the law of their residence shall accompany them wherever they may go; but no system of jurisprudence would adopt it as a rule for the interpretation of contracts, in the absence of all stipulations on the subject, that the parties, at the time of making a contract in a place of which they were citizens, had in contemplation the possibility of their becoming residents of another country. Parties may be supposed to contract in reference to what may transpire or what may take under the laws of the country to which they

are subject, but they can never be supposed to have in mind a state of things inimical to the interests of the state of which they are members.

The case of *Dennett v. Chick*, 2 Greenl. 191, is a stronger one than that under consideration. There Chick, one of two joint debtors in a promissory note, was sued in the state of Maine. The other joint debtor, Ham, not being found in that state and having no domicile there, no service was made on him. The defendant Chick appeared and pleaded in bar a judgment recovered in an action on the same note in the state of New Hampshire against Ham, Chick having no domicile or property in that state. A writ of execution was issued on the judgment and returned unsatisfied. To this plea there was a demurrer and the demurrer was sustained. The case of *Condee & Scribner v. Clark & Brown*, 2 Mich. 255, is unlike that before us. We understand that in this case the state of Michigan gave the law of the contract. The merger was caused by a recovery in the state of Ohio against one of the parties. Afterwards suit was brought against both of them in the state of Michigan. If this case decides that, under the circumstances, no action could be maintained on the note against either of the parties, it is opposed to the above cited case from Greenleaf. But if it only intended to maintain that a recovery could not be had in the action as brought, on the ground of variance between the declaration and evidence, (both parties being sued when the cause of action was merged as to one of them,) we have nothing to say against it, as, by the common law, it was clear that the action could not be maintained. In that case, too, it appears that the joint debtors were residents of the state of Michigan, and that at the time of the commencement of the action in the state of Ohio against Brown, one of the joint debtors, he was a citizen of the state of Michigan. So in fact the joint debtors by their act had not compelled the creditors to sue in the state of Ohio, and the suit was voluntary on their part, not induced by the conduct of the debtors.

Welch v. Anderson.

Our statute by making all joint contracts joint or several and allowing a suit against one or more of the joint debtors, has altered the doctrine of the common law in relation to actions on joint demands.

The other judges concur ; affirmed. *

WELCH *et al.*, Plaintiffs in Error, v. ANDERSON, Defendant in Error.

1. To entitle a widow to dower under the third section of the dower act of 1845 (R. C. 1845, p. 430), it was necessary that she should make her election so to take in the mode prescribed by the seventh section of said act; otherwise she would be entitled to dower under the first section.
2. The right of the widow in such case to elect is strictly personal; it is not transmissible by descent.
3. The widow and the heirs may, by agreement and without a formal election by the widow, determine the kind and quantity of estate she shall take as dower.
4. Suits for partition may be maintained in behalf of those having equitable titles only.

Error to Lincoln Circuit Court.

Demurrer to a petition for partition. The petition was an amended and supplemental one filed October 20th, 1857, in a suit for partition originally instituted, August 21, 1854, by Susannah Anderson, widow of Ransom T. Anderson, deceased, against the heirs of said R. T. Anderson. Susannah Anderson having died, her heirs filed an amended and supplemental petition. This petition is in substance as follows: "Plaintiffs state that to the October term, 1854, of the Lincoln circuit court Susannah Anderson filed her petition against said defendants, which petition is as follows—'plaintiff states that in the year 1852, Ransom T. Anderson departed this life intestate and without issue of his body, leaving the following named persons his only heirs, to-wit, Susan-

* A motion for a rehearing was filed in behalf of the plaintiffs in error in this case; it was overruled.

nah Anderson his lawful widow, Jeremiah Anderson his father, and James Anderson, Harrison Anderson, Sarah Cochran, Julia Williams and Mary Anderson, his brothers and sisters in equal degree; that he died seized in fee simple of the following described real estate, situated in the county aforesaid, to-wit: [describing it] containing in the aggregate four hundred and eighty-five acres; that plaintiff as widow aforesaid is entitled to one equal half of said land, and each of said defendant heirs to one equal sixth part of the other one-half thereof; that the debts against the estate of said Ransom T. Anderson are paid, and no reason exists why partition of said lands should not be made according to the rights of the parties. Plaintiff therefore asks that each of said defendants be duly notified of this suit and that the court will adjudge partition of said lands among said parties according to their respective rights, and appoint commissioners to make said partition.'

"Plaintiffs further state in this their amended supplemental petition that on the petition aforesaid a summons for the said defendants, Jeremiah Anderson, James Anderson, Harrison Anderson and James Williams and Julia Williams his wife, issued, directed to the sheriff of the county aforesaid, which summons was duly served on each of them; that another summons issued for the defendants Sarah Cochran and Mary Anderson, directed to the sheriff of St. Charles county, in which said two defendants then lived; but said sheriff of St. Charles failing to return said summons in due time as commanded, the defendant James Anderson, in order to prevent delay of the suit, went to St. Charles and obtained from said two defendants a waiver of notice, and the same was filed in open court, as the records of the case will show; that it appearing to the court, on the filing of said waiver, that each of said defendants in the cause had notice of the suit, and all failing to appear and defend the same, the court rendered judgment of partition of said lands by default, and appointed commissioners such partition to make;" that the said partition was made on the 7th of May,

Welch v. Anderson.

1855 ; that after said partition was made, but before report thereof to the court, the said Susannah Anderson died, leaving plaintiffs her only sons, who were duly made parties to the suit ; that on the filing of the report, defendants moved the court to set aside it and the judgment of partition for several causes—one of which was the want of legal notice ; that the court overruled the motion and confirmed the report ; that the defendants appealed to the supreme court, which reversed the judgment and remanded the cause ; [see *Anderson v. Anderson*, 23 Mo. 379 ;] that after the death of said Ransom T. Anderson, to-wit, October 16, 1852, the said Susannah Anderson, his widow, took out letters of administration on his estate and was about to proceed with said administration as by law directed ; that said defendants suggested to her that said administration would cause delay in the partition and distribution of said estate, would be very expensive and wholly unnecessary, as all the parties in interest were of full age and could by agreement pay the debts of said estate and determine the respective rights of each by agreement ; “ that said parties then agreed that said administration should be abandoned and not carried into the court last aforesaid for confirmation or rejection ; that said widow should pay one-half the debts of the estate, including one-half the expense of settling and making distribution and partition thereof, and have one equal half of the estate, both real and personal, as by law in such case provided ; that said parties then employed Charles Wheeler, Esq., to reduce said contract to writing, and on the 15th day of November, 1852, he wrote the articles of agreement which said parties executed on said day, and a copy of which is herewith filed, the original being filed at the office of the clerk of the court last aforesaid, with the other papers of said estate. Plaintiffs know that said Susannah Anderson believed at the time she executed said contract that it embraced the entire estate, both real and personal, and they have no doubt that said defendants also believed it. Plaintiffs further state that the omission to include said real estate or the said Susannah’s

Welch v. Anderson.

interest therein, was, as they believe and charge the fact to be, an innocent omission and contrary to the intention of both parties aforesaid; that said Susannah Anderson paid one-half of the debts of the estate, including expense of settlement, and performed every part of her said agreement in good faith; that she by consent of defendants brought her said action of partition, alleging therein that she was entitled to one equal half of said real estate; that Jeremiah, James and Harrison Anderson, and James Williams and wife were duly summoned as defendants in the cause and had delivered to them a true copy of the petition, in which she distinctly claimed the interest aforesaid, yet they suffered judgment of partition to be rendered against them by default and partition to be made according to the petitioner's prayer; that the administration of said estate being abandoned by the agreement aforesaid, it was not carried into court, and consequently the said Susannah was thereby deprived of the benefit of the notice to make her election of the interest which she would take in said estate, which it would have been the duty of the court to give her had the administration been within its jurisdiction; that defendants, well knowing that said estate owed but a small amount of debt and that it would be greatly to said widow's interest to take one equal half thereof subject to said debts, readily assented to and agreed to her said rights without further proceedings in said county court; that defendants, at all times from the date of the said agreement and the discontinuance of said administration, admitted and recognized her right to one equal half part of said real estate, and therefore she filed no declaration of her election; that said Susannah had a vested right to one-half of said real estate; that this right vested in plaintiffs as her heirs. Plaintiffs therefore pray the court to adjudge to them such equal half; to appoint commissioners to set the same apart to them, and grant such other relief," &c.

To this petition the court sustained a demurrer.

Henderson and Porter, for plaintiffs in error.

Welch v. Anderson.

I. The court erred in sustaining the demurrer. The abandonment of the administration and the agreement of the parties constitute a sufficient waiver of mere form of election. Until the widow receives notice as provided by the act of 1847, her right of election remains. In the absence of the grant of letters of administration, there is no necessity for filing with the court a written election. Until administration, the right of the widow to elect is not lost by the lapse of any length of time. Parties may settle their rights by agreement. The formal election may be waived by the parties interested. The letters in this case were never approved. The agreement set forth in the petition is sufficient to bind the heirs to a compliance with its provisions. It was made on a good and a valuable consideration. The facts stated in the petition are sufficient to require a reformation of the instrument and a decree of title. A court of equity having jurisdiction of the cause will proceed to make partition and settle the respective rights of the parties. The statute concerning partition does not divest courts of equity of their jurisdiction in partition proceedings. (18 Mo. 468; 1 Sto. 654; 3 Paige, 546; 3 Bibb, 306; 6 Dana, 276; 8 Price, 518.) The plaintiffs are entitled to amend if necessary.

Broadhead, for defendants in error.

I. An election was necessary to vest in the widow the right to one-half the land. (Hamilton v. O'Neal, 7 Mo. 11.) The statute is explicit. This election can be made only in the mode pointed out by the statute, and within the time prescribed. The widow made no election either in the manner prescribed in the statute or in any other manner. The instrument in writing set out in the petition does not embrace the land at all, but only personal property. The widow could not ask a court of equity to relieve her from the consequences of her own neglect in failing to comply with those terms. The election is not to be viewed as a contract, nor ought it to be governed by any of the rules which apply to contracts between individuals. The widow having made no

election, the agreement could not operate to vest in her the legal title to any portion of the land claimed. The real estate is not embraced in the agreement. The court is not asked to reform the agreement. In proceedings at law for partition, the plaintiff must show a legal title. (*McCabe v. Hunter*, 7 Mo. 355.) Even if a court of equity can entertain a bill for partition of titles merely equitable, the court must first perfect them into legal titles. This is not asked in the petition. There is no equity in the petition.

SCOTT, Judge, delivered the opinion of the court.

This case stands on a demurrer to the amended petition. The ancestor from whom the lands descended died in 1852; consequently the act in the code of 1845 will determine the widow's right to dower in her husband's real estate. By the first section of that act, the widow, as a matter of right, at the death of her husband, was entitled to be endowed of the third part of all the lands whereof her husband, or any other person to his use, was seized of an estate of inheritance, at any time during the marriage, to hold and enjoy during her natural life. When the husband died without any child or other descendants in being capable of inheriting, the widow had her election to take her dower as provided in the first section discharged of debts, or to take all the real and personal estate, which came to the husband in right of the marriage, remaining undisposed of, absolutely, and one-half the real and personal estate belonging to the husband at the time of his death absolutely. The provisions of the dower act contained in the code of 1835 correspond, in relation to the matter under consideration, with those contained in the code of 1845. In the case of *Hamilton v. O'Neil*, 9 Mo. 10, which arose under the act of 1835, it was held that the widow was entitled to dower under the first section of that act, which is similar to the first section of the act of 1845, unless she made an election to take otherwise as prescribed by law. It is obvious that when a right grows out of an election, it can not arise or come into existence until

Welch v. Anderson.

an election is actually made. (United States v. Grundy, 3 Cranch, 337.) The husband of the ancestor of the plaintiffs having died without children, and she having failed to make an election as to the dower she would take, there was no right or estate in her capable of descending on her heirs. The right of election being personal, it was not transmissible by descent; nor is it conceived that a failure to notify the widow of her right to make an election can confer on her heirs a right which they did not otherwise possess. It is unnecessary to determine the question, whether, if by any fraudulent contrivance of those interested to prevent an election a widow fails to make one, they will be permitted to reap the fruits of their misconduct. We conceive that an election can only be made in the manner prescribed by law. This rests on obvious principles. The matter of an election is purely a creature of positive law. Outside of the statute it has no existence. Hence if it is not clothed substantially with the requisites exacted by the statute, its existence can not be recognized. (Kemp v. Holland, 10 Mo. 259.)

But there is a feature in the petition of the plaintiffs which commends their cause to the more favorable attention of the court. That feature is, that their rights, although failing under the law of election, are supported by a valid contract. We can see no objection to this view of the case. Parties *sui juris* are as competent to contract in relation to dower as to any other subject. The widow could agree with the heirs capable of binding themselves as to the quantity of the estate she should take as doweress. If a mistake has occurred in committing the agreement to writing, there is nothing in the nature of the subject which exempts that agreement from reformation according to principles of equity more than any other agreement. If the alleged mistake is clearly and satisfactorily established, there is no reason why it should not be corrected as to all those who were capable of contracting and who are bound by the agreement. Married women and minors would not of course be bound.

Under our system of jurisprudence, there is nothing which

Watson v. Watson.

forbids a party having an equitable title from applying for partition in the forms adapted to such relief employed in courts of equity. It is well settled in the jurisprudence of America that a mistake in a written agreement is not only a defence in equity, but that a complainant may be entitled to the reformation of a contract and to the relief consequent upon such reformation; or, in other words, that a mistake in a written agreement is not only a defence to a petition, but it may be stated as a ground of equity, and affirmative relief be granted upon its being clearly and satisfactorily established. The circumstances of this case strongly corroborate the allegation of the bill as to the error committed in draughting the agreement set up as the foundation for the relief sought by this petition, and if they are not explained away or counteracted in proof, should entitle the plaintiffs to a judgment against the parties to it who were *sui juris*.

Judgment reversed and remanded; Judge Richardson concurs. Judge Napton concurs in reversing the judgment.

WATSON, Appellant, v. WATSON *et al.*, Respondents.

1. To entitle a widow to dower under the first section of the dower act (R. C. 1855, p. 668), it is not necessary that she should elect so to take. No election to take dower under the first section of the act can, as an election, take away her right to elect to be endowed under the eleventh section of said act. To overthrow this right, there must be a binding contract or such facts and circumstances as will work an estoppel *in pais*.
2. The institution of a suit by a widow to recover dower according to the first section of the dower act, and the declaration in the petition in such suit, which is signed and sworn to by her, that she thereby elects to take as her dower the third part of the lands of the deceased husband, will not take away her right to elect, within eighteen months after the grant of letters testamentary or of administration, to take dower under the eleventh section of said dower act.

Appeal from St. Louis Land Court.

Meany, for appellant.

- I. The plaintiff was not estopped.

Gantt, for respondents.

The widow, in the most solemn and authentic manner, elected to have dower according to the provisions of the first section. She has no claim to the benefit of the eleventh section. She can not allege ignorance of law. She made her election between the provisions of the first and eleventh sections. No notice is required to be given to the widow to put her upon her election. She was *sui juris*, free from all disability. There is no limit whatever to the modes in which she may renounce the benefits of section eleven — express renunciation, nonclaim, and direct declaration of preference for and demand to have the alternative. An election can be exercised only once. When the party has chosen, his right is exhausted. (Bouvier, Law Dic. tit. Election; Co. Litt. 146, 136.)

SCOTT, Judge, delivered the opinion of the court.

On the 26th day of June, 1856, letters of administration on the estate of Ringrose J. Watson were issued. On the 18th September, 1857, Frances Watson his widow, under the eleventh section of the act concerning dower, approved November 29, 1855, elected to take a child's part of the real estate, whereof her husband died seized or possessed, in lieu of the dower or provision made for widows by the first section of that act. This election was made in conformity to the requirements of the statute. Prior, however, to its being made, the widow had brought suit to recover her dower, in which she claimed it under the first section of the foregoing recited act. Her petition set out, among other matters, that "she was entitled to her dower interest, as widow, in said tracts of land; said dower interest being an undivided one-third interest therein for the term of her natural life, the same being the kind of dower which she hereby elects to take in the land." This suit was brought to the March term, 1857; and afterwards, she having in the mean time made the election above mentioned under the eleventh section of the

act concerning dower, the plaintiff, at the October term, 1857, filed an amended petition in which she claimed dower according to said election, alleging that at the time of filing her original petition she was ignorant of her true rights and interests in the premises, and had been misinformed as to them by an attorney at law whom she consulted. The defence was that the widow was concluded by the election she had made in her original petition, and that a subsequent election was of no effect, she having already made one. Of this opinion was the court, and gave judgment accordingly.

We do not well see on what principle the judgment in this case is based. It is obvious that, after an intelligent and free election has been made in pursuance to the forms of law, a widow will be bound by it, and will not be permitted to make another; but, in order to constitute an election, it must be made substantially in the manner prescribed by law. If it is not made in the way required, it is no election. If the widow intended to take under the first section of the act concerning dower, no election was necessary. In the absence of an election to take under the eleventh section of the act, the law determined what her dower should be independently of any election. An election to take under the first section amounted to nothing. It would not prevent her taking afterwards under the eleventh section. If a widow should declare that she would have no dower, that her choice was to take none, would such a declaration prevent her afterwards recovering her dower? If she should renounce in the most solemn form the provision made for her by the eleventh section, though not in the manner required by law, what would prevent her afterwards, within the fifteen months, from electing to take it? Nothing but a binding contract or an estoppel *in pais* could restrain her from making her claim. The law allowed the widow fifteen months, during which she might choose whether she would take dower under the eleventh section. If she intended to take under the first section, no election being necessary to obtain that, it is obvious that any declarations she might make, how solemn soever

Watson v. Watson.

they might be, that she would take under the first section, would not prevent her claiming her dower under the eleventh section, if an election to do so was made within the fifteen months allowed for that purpose. The declarations, in order to have that effect, must have been such as would constitute an estoppel *in pais*. It is not necessary to determine what would have [been] the effect of a judgment in a suit for dower under the first section.

But take the law as the defendants suppose it is, that an election to take under the first section of the act concludes the dowress, and that she will not be permitted to take afterwards any other dower, yet is there here any election made in conformity to the statute? The eleventh section of the dower act provides that when the husband shall die leaving a child or children or other descendants, the widow may, in lieu of dower of one-third part of all lands whereof her husband died or shall die seized of an estate of inheritance, to hold and enjoy during her natural life, elect to be endowed absolutely in a share of such lands equal to a share of a child of such deceased husband. The twelfth section of the act provides that such election shall be made by declaration in writing, acknowledged before some officer authorized to take the acknowledgment of deeds, and filed for record in the office of the recorder of the county in which letters testamentary or of administration shall be granted, within fifteen months after the grant of the same; otherwise she shall be endowed under the provisions of the preceding sections of this act. In a previous case during the present term, it was held that an election under the statute, in order to be binding, must conform to the substantial requirements of the law. (*Welch et al. v. Anderson et al.* 28 Mo. 293.) A petition filed in the land court in an action at law, though subscribed and sworn to, is a thing so different from an instrument to be executed, acknowledged and filed for record in the recorder's office like a deed, that it can scarcely be necessary to make observations pointing out their dissimilarity.

Miller v. Mitchell.

We can not see any show of resemblance between them, nor any ground whatever for maintaining that it is such an election as is contemplated by law. Reversed and remanded.

MILLER, Respondent, v. MITCHELL *et al.*, Appellants.

1. A. delivered to B. 300 barrels of cement on storage. B. gave to A. a receipt acknowledging the delivery of said cement on storage for C. and stating that it was to be delivered upon return of said receipt endorsed by C. This receipt A. delivered to C., and C. gave to A. an instrument in writing stating that he received and held it as security for the payment of a promissory note drawn in his favor by A. He also thereby engaged to deliver said receipt up to A. or his order upon payment of said note. D. instituted a suit by attachment against A. and summoned C. as garnishee. Afterwards C. instituted a suit against B. to recover the value of the cement which B. had refused to deliver to C. on the presentation of the above receipt. After the institution of this suit against B. but before C. had filed his answer to the interrogatories in the attachment suit, A. paid to C. the promissory note for which the warehouse receipt above mentioned was held as a security, and A. gave to B. the instrument in writing above mentioned signed by C., with an order endorsed thereon by A. for the delivery to B. of the receipt given by B. C. answered the interrogatories in the attachment suit, setting forth the facts above stated, the institution of the suit against B., and the payment of the promissory note by A. He further stated in his answer that whatever judgment he should obtain against B. would be the amount in his hands belonging to A. Judgment was rendered in the attachment suit against C., the garnishee. *Held*, that, as C. held the cement merely by way of security, and the debt for which it was so held had been paid, C. was not entitled to recover in the suit against B. more than the costs of suit.

Appeal from St. Louis Court of Common Pleas.

The facts sufficiently appear in the opinion of the court.

B. A. Hill and Comfort & Manter, for appellants.

I. When Miller recovered the judgment in this case he had no interest whatever in the cement or the receipt. When the suit was brought he had only a lien on the cement for four hundred dollars. When the note was paid, his interest ceased. Miller never could be regarded as holding the ce-

Miller v. Mitchell.

ment for the use of Daniels. Defendants held it in trust to satisfy Miller's note, and, as to the balance remaining after the payment of the note, for the use of Daniels. The judgment against Miller upon the garnishment was clearly erroneous. If Brady & Bro. claimed that Daniels was interested in the cement, they should have attached it in defendants' hands subject to their charges and the lien of Miller. Miller was not liable to Daniels, the debtor of Brady & Bro., for any debt. (3 Porter, 105; 5 Ala. 403; 13 Metc. 332; Drake on Attachment, § 545.)

H. N. Hart, for respondent.

I. The garnishment was sufficient to hold the cement in the hands of Miller, after satisfying the debt due by Daniels to Miller.

SCOTT, Judge, delivered the opinion of the court.

The facts and dates in this case are a little complicated, but when understood will, we are inclined to the opinion, not entitle the plaintiff to recover. This suit was begun on the 12th of September, 1856, and the petition substantially sets forth that on the 8th of August, 1855, A. Daniels delivered to the defendants to be stored for and on account of the plaintiff three hundred barrels of cement; that on the delivery of the cement the defendants, by their agent W. Harlow, gave their receipt whereby they agreed to deliver up the cement on the return of the receipt endorsed by the plaintiff; that in May, 1856, the plaintiff tendered the receipt endorsed by him, but the defendants failed to deliver the cement, which was worth seven hundred and fifty dollars. The answer of the defendants admitted the delivery of the cement and the giving of the receipt. It averred that on the day the receipt was given the plaintiff signed a writing, whereby he acknowledged to have received said receipt given by the defendants to Daniels, and that he held the same as security for the payment of a promissory note for four hundred dollars, drawn by Daniels, and which he promised to redeliver to

Daniels upon the payment of the said note ; that the receipt was delivered as security for the payment of said note, and that the plaintiff had no other interest in it ; that, since the bringing of this suit and on or about the 7th of November, 1856, the said Daniels paid said note, and then endorsed to the defendants the writing of the plaintiff whereby he acknowledged that he held the receipt for the lime as collateral security.

On the trial, which was by the court, the plaintiff gave in evidence the receipt for the cement described in the pleadings ; also the record, which was excepted to, of a suit in attachment begun by Brady & Brady against Daniels, in which the plaintiff Miller was summoned as a garnishee on the 26th of May, 1856. Miller answered the interrogatories filed in the said suit, to the effect, that at the time he was garnished, Daniels was indebted to him in the sum of four hundred dollars, and as collateral security for the payment of the same Daniels placed with Mitchell, Rammelsberg & Co. three hundred bushels of cement on his account and subject to his order, for which they executed to him their receipt for the same ; that before he was garnished he instituted suit (meaning this suit) for the recovery of the value of said lime, in the St. Louis court of common pleas against the said Mitchell, Rammelsberg & Co. ; that said Daniels did after the said suit against Mitchell, Rammelsberg & Co. and the said garnishment pay him what he owed him. The answer then concludes in these words : "I therefore answer that whatever judgment I shall have and obtain against the said Mitchell, Rammelsberg & Co. will be the amount in my hands belonging to said Daniels. Outside of which I have no other property, goods, chattels, effects and credits belonging to the said Daniels, nor in any other manner than as aforesaid indebted unto him." This answer was made 22d December, 1857. In May, 1857, final judgment was taken in the attachment suit against Daniels, the defendant, for \$582.20, and afterwards, on the 10th of Feb'y, 1858, judgment for \$658.30 was ordered against the garnishee Miller in this suit. It was

Miller v. Mitchell.

admitted that about November 7, 1856, Daniels paid Miller the promissory note. Miller's acknowledgment in writing that he held the receipt for the cement as collateral security was given in evidence by the defendants Mitchell, Rammelsberg & Co., with an order endorsed thereon by Daniels to deliver to them the said receipt. Harlow, a witness, testified that at the time Miller was garnished he said that he did not know that he could give up the receipt, as he had been summoned as garnishee in the suit of Brady & Brady v. Daniels, and did not know but that he might be held by the garnishment. The court having refused the instructions asked by the defendants, gave judgment against them.

Take this case in the most unfavorable light for the defendants that the legal title to the cement was in the plaintiff, and that at the time of the garnishment the defendants had no right or property in it; what then would have been the rights and duty of the plaintiffs? The possession of the cement was not in the plaintiff, nor was it understood that it should be until default was made in the payment of the debt due to him by Daniels. The fact that the plaintiff was garnished did not oblige him to institute a suit to recover the cement. There is no law imposing this burden on a garnishee. This suit had not its origin in the belief that there was any such obligation resting upon the plaintiff. So far from it, it was instituted before he was garnished. The petition in the case shows this and the object of the suit. Whether he was garnished or not, the only interest he had in the cement amounted only to as much as would satisfy his lien or mortgage. As this mortgage was satisfied he would only have been entitled to a judgment for costs. As the cement was not in the possession of the plaintiff, if there was an interest remaining in Daniels after the lien was satisfied subject to attachment, it should have been attached in the hands of those who held it. The possession not being in the plaintiff when he answered, he should have surrendered the receipt, as his debt had been paid and he had no other interest in it, and the right to the cement would have been con-

tested in an action to which the defendants would have been parties. The twenty-eighth and thirty-fifth sections of the attachment law authorized this, if they did not require it. He ought not to have made a defence for others when he knew nothing about their rights. He had no interest in the cement when he made his answer to the interrogatories, and should have retired from the controversy. He could not compromit the rights of the defendants by undertaking to make a defence for them. Although the writing signed by the plaintiff evidencing the mortgage or lien on the cement was not endorsed to the defendants with the order for the receipt until after the garnishment was served, yet, as the endorsement was made as soon as the plaintiff's debt was paid and as soon as there was a right to demand the receipt, it may well have been that the defendants' right to the cement accrued long, long before, subject to the plaintiff's lien. Indeed the fact was so stated in the first answer of the defendants, but omitted in the last, they not recollecting that, by the present practice act, when an amended pleading is filed, it must contain in one entire pleading all the matter of all the previous pleadings. (R. C. 1855, p. 1255, § 16.)

If, after the plaintiff was garnished, the property, not being in his possession, was made away with, he would not have been bound for it, nor would the law require him to bring suit. If it was made way with before the garnishment, all that was necessary to be done was to have delivered up the receipt at the time of the answering. If the cement had been in the possession of the plaintiff when he was garnished, he would have been bound to have held it as any other garnishee. But he might have given up the property to satisfy the judgment in the attachment suit against the defendant and thereby prevented any judgment against him. If the plaintiff had endorsed the receipt and surrendered it into the custody of the law, as he ought to have done, his debt being satisfied, could there have been a judgment against him personally? This might have been done under the twenty-eighth and thirty-fifth sections of the attachment law. By

Miller v. Mitchell.

voluntarily submitting to a personal judgment against himself, he can not expect that the defendants should be deprived of their rights unheard and without an opportunity to defend them. They were not parties to the attachment suit, and could make no defence. They had no opportunity of showing that their right to the cement accrued long before there was any garnishment, as stated in their first answer.

This is not like the case where a debtor is garnished who discloses all the facts in relation to the debt within his knowledge up to the time of answering, and is yet condemned to pay it to the creditor in the attachment suit. There he shall not be compelled to pay it again, and the judgment against him in the attachment suit is conclusive in his favor. Here there is no judgment against a garnishee debtor which he has satisfied and his original creditor seeking to subject him to pay it a second time. But a garnishee has unnecessarily and without authority submitted to make an answer in an attachment and suffered a judgment to go against him, and is now prosecuting this suit in order to indemnify himself against the judgment, which by his own conduct he has caused to be rendered against him, and would make that judgment binding against a party, who may have a valid defence to the action in which it was rendered, and who has had no opportunity to make that defence.

It is singular how this and the attachment suit are made to move in a circle. In the attachment suit, the plaintiff in his answer says he will owe Daniels what he shall recover in this suit. In this suit he recovers what was recovered against him in the attachment suit. As the plaintiff at the time of his answer in garnishment had no interest in the property, he should have surrendered up the receipt and not have suffered judgment to go against him, and his doing this did not make the proceedings in that case evidence in this against the defendants.

Judgment therefore will be reversed and the cause remanded. The other judges concur.

RAINEY, Appellant, v. SMIZER & GRIMM, Respondents.

1. In a suit to recover damages for the breach of a written contract entered into with two persons, both must join as parties plaintiff. The fifth section of the second article of the practice act is inapplicable to such a case. (R. C. 1855, p. 1218.)

Appeal from St. Louis Law Commissioner's Court.

George Smizer entered into a contract with James C. Rainey and Jacob Grimm, of which the following are the substantial provisions: "Whereas Joseph Probeck contracted to do certain mill-wrighting for the undersigned, George Smizer, and whereas he, the said Joseph Probeck, has failed, leaving the work unfinished, &c., we, James C. Rainey and Jacob Grimm, agree and by these presents bind and oblige ourselves to do all the unfinished mill-wrighting on said mill and distillery, to have all things pertaining thereto, of the work now unfinished, in complete running order, &c., &c., for which the said Smizer is to pay to the said Rainey and Grimm the sum of \$270, also \$105 due the said Rainey for mill-writing done for Joseph Probeck on said mill, which sum the said Smizer assumes the immediate payment of. * * * It is understood that the said Smizer is to furnish all the material for said work, and he (the said Smizer) is to retain fifty per cent. of said payment, as per contract, as security for completion of said work, and that he (the said Smizer) agrees to pay the additional amount of fifty per cent., if the amount due is not paid upon completion of said work."

The present suit is brought by Rainey alone to recover the sum of one hundred and five dollars, alleged to be due the plaintiff under the contract, and the further sum of forty-five dollars, alleged to be one-half the value of the work done under the contract. Grimm was made a defendant for the reason, as stated in the petition, that he had refused to become a party plaintiff and had confederated with plaintiff to hinder and delay plaintiff from recovering his demand.

Rainey v. Smizer.

The court instructed the jury that the plaintiff was not entitled to recover.

C. C. Simmons, for appellant.

C. G. Mauro and *Gardner*, for respondents.

SCOTT, Judge, delivered the opinion of the court.

If it is conceded that by the contract between the parties Smizer was bound to pay the plaintiff, immediately upon the commencement of the work the sum of one hundred and five dollars, the amount due the plaintiff for services performed in building the mill under a contract with Probeck, yet that sum constituted but a part of the consideration of the contract. The refusal of Smizer to comply with his contract with the plaintiff and Grimm did not give a right to them to sue and recover the price of the work as though it had been actually done. This is not like the case where a servant or agent is employed for a stated period and is afterwards wrongfully turned away. The contractors were entitled to the damages they could show they had sustained by reason of the defendant Smizer's having prevented the performance of the contract on their part. The one hundred and five dollars was a part of the consideration, and no reason is seen why it should be recovered more than any other portion of it. It can make no difference that the sum was originally due to the plaintiff from another person for work done on the same mill.

If Smizer has violated his contract in preventing the plaintiffs from doing the work they had undertaken, he is liable to an action; but that action could only be brought in the joint names of Rainey and Grimm, the contractors. That provision of the practice act, which allows a party to be made a defendant when he will not join as a plaintiff, has nothing to do with this question. That was a rule of equity practice which was necessarily incorporated into a system which abolished all distinction of actions. In adopting it, it was not designed that it should have any operation but in cases where

Russell v. Lynch.

it was applicable under the former system of practice. It was never intended that it should affect the rights of parties arising out of written contracts. Nothing is better settled than the rule that on an undertaking to two, both must join in an action on it; otherwise there is no cause of action. It is a part of the contract that both shall sue, otherwise no action shall be brought. If one will say that he has no right of action and will not sue, why should he not have as much weight as the other who says there is a cause of action? But if one sues and the other will not, what shall be recovered, the whole or only half of the demand? Is the contract to be divided? Shall one recover the half at one time and in one action, and the other a half at another time in a separate action? Suppose that one sues, and the other will not join because he is waiting for evidence which he knows can not be had in time for the trial, and is defeated, will the other lose his remedy? If one sues and recovers and the other is defeated, what an anomaly will be presented! A judgment for one plaintiff on a contract and a judgment against the other; which of the two judgments will prevail, or will both stand? These are some of the difficulties that must be encountered in maintaining that one of several obligees may maintain an action upon the obligation. This point was decided in the case of *Cable v. Clarke*, 21 Mo. 223.

The judgment will be affirmed; the other judges concur.

RUSSELL, Respondent, v. LYNCH, Appellant.

1. A slave was placed in a private jail-yard for safe keeping. The bailor at the time knew, through occasional visits to the yard, that a negro boy watched at the door of the enclosure and opened the same for purposes of ingress and egress. *Held*, that this fact would not, in an action to recover damages for the escape of the slave through negligence on the part of the jailor, prevent the bailor from complaining of the trust reposed in the negro boy as an act of negligence.

Error to St. Louis Court of Common Pleas.

S. T. & A. D. Glover, for appellant, cited Story on Bailment, § 74 ; 13 Ala. 558 ; 38 Maine, 55.

Shepley, for respondent.

Scott, Judge, delivered the opinion of the court.

The only point made by the defendant in this court is the refusal of the court below to give the following instruction : " If the plaintiff knew before or at the time of placing the slave mentioned in the petition that a negro boy belonging to the defendant watched at the outer door of the defendant's enclosure in which the said negro was placed and opened the same for the purposes of ingress and egress, she can not now complain of such trust to the negro boy as an act of negligence on the part of the defendant."

The principle stated in Story on Bailments, § 74, is cited by the defendant to show that the court below erred in refusing the foregoing instruction. The principle is, that if a depositor agree that the goods may be kept in a particular place, as on a ship's deck, or in a ship's cabin, he can not afterwards object that the place was not a safe one, for his assent amounts either to a qualification of the contract for safe custody, or to an agreement that for all the purposes of the deposit the place shall be deemed sufficiently safe. The case of Hatchett v. Gibson, 13 Ala. 588, cited by the defendant, determined that if, after a contract to store cotton in a fire-proof warehouse, the owner of the cotton discharges the bailee from the obligation of completing such a warehouse, and consents that his cotton may be stored in a house which is not fire-proof, such consent can not be withdrawn after a loss has occurred. The case of Knowles v. The Atlantic & St. Lawrence R. R. Co., 38 Maine, 55, holds, that when the bailor or depositor not only knows the general character and habits of the bailee, but the place where and the manner in which the goods deposited are to be kept by him, he must be

State, to use of Bank of Missouri v. Sanger.

presumed to assent in advance that his goods shall thus be treated, and if under such circumstances they are damaged or lost, it is by his own fault or folly. Now the principle of these cases is not applicable to the circumstances of that under consideration. There is nothing in it which shows that the plaintiff consented to any relaxation of the care and diligence necessary for the safe keeping of her slave. Nobody would have inferred from the casual circumstance that a negro boy opened the gate of the prison-yard on two or three occasions, when it was visited by the plaintiff's agent, that the boy was the keeper of the prison and had the care of the slaves committed to it. So slight an occurrence, one which is so little calculated to attract attention, can never be the foundation for an assent on the part of the owner of the slave that such boy should be the keeper of the prison during the confinement of her slave.

Judge Napton concurring, judgment affirmed, Judge Richardson not sitting.



THE STATE, TO USE OF BANK OF MISSOURI, Respondent, v.
SANGER, Appellant.

1. When the record proper of a cause shows that a demurrer to a petition has been regularly heard, considered and overruled, the objection will not be entertained in the supreme court that the court overruled the demurrer without hearing counsel.

Appeal from St. Louis Circuit Court.

McClellan, Moody & Hillyer, for appellant.

Burnes, for respondent.

SCOTT, Judge, delivered the opinion of the court.

The ground on which the defendant seeks a reversal of the judgment of the court below finds no support in fact on the record. So far from it, the record contradicts the fact on

State, to use of Bank of Missouri, v. Sanger.

which the defendant would reverse the judgment. The defendant complains that the court disregarded his demurrer without hearing counsel, when it was regularly on file when the judgment was rendered. The record shows that the demurrer was regularly heard and considered and overruled, and thereupon judgment was entered as for want of an answer. This, to be sure, was not the proper entry, for the judgment should have been entered upon the demurrer upon its being overruled. The entry should have been, "therefore it is considered by the court that the plaintiff have and recover," &c. This, however, is not such an error as would warrant a reversal. Upon the demurrer being overruled, the defendant was by statute, as a matter of course, entitled to plead. But it does not appear that he claims this right, but judgment went against him, and afterwards he made a motion for leave to plead without any affidavit of merits or showing any reason why the judgment should be set aside and leave given to plead.

When a judgment is once regularly entered, a court will not set it aside and let in a defence but upon sufficient cause being shown. The motion set forth no reason why the judgment should be set aside, because the reasons contained in it stood contradicted by the record proper. What is in the record proper can never be contradicted by any thing contained in the bill of exceptions. If an entry in the record is false or incorrect, it should be amended when it can lawfully be done; but if a false entry is not thus obviated, it can not be contradicted, for a record imports absolute verity. (*Weber v. Schmeisser*, 7 Mo. 600.)

The only point properly raised by the record is whether the petition was sufficient to maintain an action. No defects have been pointed out, and, upon examining it, none occur to us. The other judges concur. Affirmed.

KARR *et al.*, Respondent, v. JACKSON, Appellant.

1. The mode of authenticating the laws and records of the different states prescribed by the laws of the United States, is not exclusive of the common law modes of proving the same, thus, where the general banking law of a sister state requires articles of association entered into in pursuance thereof to be recorded and makes a duly certified copy of the record evidence, a sworn copy of such record is admissible in the courts of this state.

Appeal from St. Louis Court of Common Pleas.

This was an action on a promissory note executed by defendant in favor of the Bank of Belleville. The note was assigned to the plaintiffs. The answer put in issue the establishment of the Bank of Belleville under the laws of Illinois, and further set up that the note was without consideration and was procured by fraudulent representations. The plaintiffs gave in evidence the general banking law of Illinois approved February, 15, 1851. (See Sess. Acts, Ill., 1851, p. 163; Statutes of Ill. 1858, p. 111.) Plaintiffs also offered in evidence the deposition of F. Karsch, who testified that he was deputy recorder in St. Clair county, Illinois; that the copy of the articles of association of the Bank of Belleville, which was annexed to his deposition as an exhibit, was a correct copy of the record in the recorder's office of the said articles; that the original articles had been taken away from the recorder's office after being recorded. This exhibit purported to be the certificate or articles of association establishing the Bank of Belleville under the law of Illinois above referred to, and to have been acknowledged, &c. To this exhibit there were two certificates annexed. William S. Thomas, clerk of the circuit court of St. Clair county, Illinois, and *ex officio* recorder of deeds for said county, certified, under the seal of said court, that said exhibit was a true and correct copy of the original on record in his office, in book No. 3, page 422. The presiding judge of the St. Clair circuit court certified as follows: "That the foregoing attestation of Wm. L. Thomas, clerk, by Ferd. Karsch, de-

Karr v. Jackson.

puty, is in due form of law." The defendant objected to the reading of said certificate or articles of association annexed to the deposition of Karsch on the following grounds: first, because the certificate of the judge thereto appended did not state that the attestation of the clerk and *ex officio* recorder was by the proper officer, and because no certificate was appended that the said judge was duly commissioned and qualified; secondly, that it was not admissible as an examined or sworn copy; that it did not purport to be a copy of the original; nor did it appear that the witness had compared with it the original, or in whose custody the book or record was from which said exhibit was made. The court admitted said articles of association in evidence.

Krum & Harding, for appellant.

I. The court erred in admitting the copy of the articles of association establishing the Bank of Belleville. The writing was not certified in conformity with the act of Congress concerning the authentication of records. (4 Mo. 371.) It was not admissible as a sworn copy. It was a copy of a copy. The witness did not and could not state that it was a copy of the original.

II. There was no consideration for the note. The subscription of the defendant amounted to nothing, for all the stock had been already taken by Bogy, Miltenberger & Poulterer.

Gantt, for respondent.

I. The incorporation of the Bank of Belleville was duly proven.

II. There was a sufficient consideration for the note.

SCOTT, Judge, delivered the opinion of the court.

The principal question in this case is whether the certified copy of the record of the association of persons, for the purpose of establishing the Bank of Belleville in the state of Illinois, under the general banking law of that state passed on

the 15th February, 1851, was properly admitted in evidence. The copy, besides an authentication under the laws of the United States, was sworn to be a true one taken from the record in Illinois. The law required the certificate of association to be recorded in the office of the recorder of the county where any office of such association should be established, and a copy of such certificate was made evidence for or against whom any such evidence may be necessary.

Admitting that the certificate was not so authenticated under the laws of the United States as to be read in evidence, yet it is well settled that the mode of authenticating the laws and records of the different states prescribed by the laws of the United States in pursuance to the federal constitution, so as to make them evidence in the courts of the different states, is not exclusive; that is, the laws of Congress did not intend to exclude the common law methods of proving such documents. (*Kean v. Rice*, 12 Serg. & Raw. 203; *Cowen & Hill's notes*, 1125.) A foreign judgment may be proved by a sworn copy. (*Church v. Hubbard*, 2 Cranch, 187; 6 Wend. 475.) If a foreign judgment may be proved by a sworn copy, no reason is seen why any other foreign records may not be proved in the same manner. The law of Illinois required the certificate of association to be recorded; in fact made it a record and a copy of that record evidence. There is nothing in our laws which opposes the introduction of such evidence. If the record had been authenticated in pursuance to the laws of the United States, it is not denied but that it might have been read; it being then a record which might have been so authenticated as to be read under the laws of the United States, it was such a record as might have been proved according to the course of the common law, and being so proved it was admissible in evidence. The certificate was proved to be a sworn copy of the record, and the record being in itself full and primary evidence, there is no weight in the objection that the copy used as evidence was not a copy of the original. Indeed it is not seen on what ground the copy would have been primary evidence, had it

Bohn v. Devlin.

been proved to have been a copy merely of the original, the original being a private instrument.

The evidence in the case clearly establishes the consideration of the note sued on. The defendant might at any time have had a certificate of the stock subscribed for, had he applied for it. The note was given in payment of a subscription for stock.

Judgment affirmed ; the other judges concur.

BOHN, Respondent, v. DEVLIN, Appellant.

1. After a defendant in an action before a justice of the peace appears and consents to a continuance, it is too late to object to the jurisdiction of the justice on the ground that the defendant did not reside in the township in which the suit is brought.
2. A notice to take depositions that is unsigned is insufficient ; depositions taken upon such a notice, the opposite party not attending, either in person or by attorney, at the time and place specified in the notice, may be suppressed.

Appeal from St. Louis Law Commissioner's Court.

C. C. Simmons, for appellant.

A. M. & S. H. Gardner, for respondent.

NAPTON, Judge, delivered the opinion of the court.

The defendant in this case did not reside in the township where the suit was brought, and the proceeding, being in this respect irregular, could no doubt have been set aside had the proper steps been taken in time. But the defendant appeared and consented to a continuance. As the justice had undoubted jurisdiction over the subject matter, and the appearance and consent of the defendant gave jurisdiction of the person, the defects and irregularity in the process must be considered as waived. (Davis v. Wood, 7 Mo. — ; Myers v. Woolfolk, 3 Mo. 246 ; Busnell and others v. Lynch, 3 Mo. 261 ; Malone v. Clark, 2 Hill, 657.)

Conran v. Sellew.

The notice to take depositions was insufficient, as it was not signed. As it had no signature, and the plaintiff to whom it was addressed did not attend at the time and place specified in the notice, either in person or by attorney, the deposition was, in our opinion, properly suppressed.

The other judges concurring, judgment affirmed.

CONRAN, Respondent, v. SELLEW *et al.*, Appellants.

1. The issues of fact in an action brought to obtain the surrender and cancellation of a promissory note must be tried by the court, unless the court takes the opinion of a jury upon some specific question of fact involved therein, by an issue made up for that purpose. (R. C. 1855, p. 1261, § 13.)
2. Where the trial must be by the court, instructions or declarations of law in the form of instructions are not required, and if given will not be reviewed or noticed by the supreme court.

Appeal from St. Louis Court of Common Pleas.

Plaintiff alleges in his petition that on the 28th of October, 1854, he executed his promissory note to C. E. Labeaume for \$416.25, payable sixty days after date; that this note was endorsed by said Labeaume and by A. & A. Wood & Co.; that said note while the property of A. & A. Wood & Co. was by said firm deposited with Sellew & Co. as collateral security for a sum of money borrowed by said A. & A. Wood & Co. of Sellew & Co.; that afterwards the money for which the note was deposited as a security was fully paid and A. & A. Wood & Co. became entitled to the return of said note, and said Sellew agreed to return the same, but failed to do so; that while the note was thus in the possession of said Sellew, plaintiff paid the full amount thereof to A. & A. Wood & Co., and said firm gave to the plaintiff an order in writing on Sellew & Co. requesting the delivery of said note to plaintiff; that this order was presented to Sellew coupled with a demand for said note; that Sellew refused to deliver up said note, &c. Plaintiff prayed that defendants

Conran v. Sellew.

might be required by decree of court to surrender up said note to plaintiff to the end that the same might be cancelled, and also prayed damages for its detention.

The cause was tried by the court without a jury. The court gave instructions prayed by plaintiff and refused others asked by defendants. The court decreed that the note should be surrendered up to plaintiff.

Gray, for appellants.

I. If plaintiff's note was pledged for the \$300 borrowed money and that had been paid, still Sellew & Co. were equitably entitled to retain plaintiff's note for the unpaid balance of the \$1000 draft. No right of action accrued to plaintiff. A. & A. Wood & Co. were alone in privity with Sellew & Co. In a suit by A. & A. Wood & Co., Sellew & Co. could have set off the balance due them. Sellew & Co. could set up their claim against Conran, assignee of A. & A. Wood & Co. The first and second instructions asked by defendants should have been given. Conran could only sue as assignee, and the order did not amount to an assignment. It did not purport to be an assignment; besides, it was made by one partner more than two years after the dissolution. The fourth instruction should have been given. A. Wood and Meyers, who testified for plaintiff, were in the position of assignors of the right of action, and were incompetent to testify about any facts occurring before the assignment, the order of June 29, 1857.

Grover, for respondent.

RICHARDSON, Judge, delivered the opinion of the court.

"The twelfth section of the tenth article regulating practice in civil cases (R. C. 1855, p. 1261) provides that "an issue of fact in an action for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless a jury trial be waived, or a reference ordered;" and the thirteenth section directs that "every other issue must be tried by the court, which, however, may take the opinion

of a jury upon any specific question of fact involved therein by an issue made up therein for that purpose, or may refer it." These provisions manifestly make a distinction between suits which were formerly recognized as actions at law, and bills in equity; and the mode of trial in a given case under the present code may generally be determined by ascertaining whether under the old system it would be cognizable at law or in equity. In the former class of actions, whether the case is tried by a jury or submitted to the court, propositions of law must be presented in the form of instructions; (*Von Phul v. City of St. Louis*, 9 Mo. 49;) but in the latter class, instructions are not required, and perform no function in a case, except to indicate the points of counsel; and in such cases this court will not review instructions given or refused. This cause was properly triable by the court, and the instructions therefore will not be noticed.

There was evidence tending to show that A. & A. Wood & Co. borrowed of the defendant three hundred dollars, for which they executed their note and at the same time left with him as collateral security the note which they held on the plaintiff; that subsequently one of the late firm of A. & A. Wood & Co. paid to the defendant their note for three hundred dollars, and requested that it and also the collateral should be surrendered, which the defendant agreed to do, but did not at the time, for the reason that the collateral was deposited at a banking house, which he promised to send for and deliver up. Under this state of things the defendant had no longer any interest in the note, which had been deposited with him merely to secure the payment of another, but the right to it became reinvested in A. & A. Wood & Co., who could treat it as their own property. They had the right to receive the payment of it, and as soon as the plaintiff paid it he became entitled to the possession of it without anything more. An assignment of the note was not necessary to give him a right to it after he had paid it. The order on the defendant to deliver the note to the plaintiff was not an assignment, and as either partner after their dissolution had

a right to collect the debts due to the firm, either had the right to give the order.

The evidence of A. Wood and Meyers related to facts which occurred after the plaintiff's note had been assigned to the defendant as collateral security, and there is therefore nothing in the second clause of the sixth section of the act concerning witnesses (R. C. 1855, p. 1577) which rendered either of them incompetent. The other judges concurring, the judgment will be affirmed.



HILL *et al.*, Appellants, v. STURGEON & RAWLINGS, Respondents.

1. A common carrier is an insurer of goods entrusted to him for transportation; if loss or damage occur, he is liable unless he shows affirmatively that it happened by reason of some one of the excepted perils. The onus being upon the carrier, he will not be discharged from liability by showing that the navigation was difficult or dangerous, or that he employed skillful or competent persons to control and manage the boat; he must show that the loss occurred in a manner and for a cause that will acquit him.
2. The words "dangers of the river, &c.," in a bill of lading, mean only the natural accidents incident to river navigation, and do not embrace such as may be avoided by the exercise of the skill, judgment and foresight demanded of the carrier.
3. If at the time of a disaster and consequent damage or loss of goods in charge of a carrier, he is guilty of some delinquency—as by having an incompetent pilot in charge of the boat—if such delinquency *might* have contributed to the disaster or *might* have had an agency in producing it, he will be liable; he may, however, show by way of defence that the disaster *must* have occurred although the delinquency had never existed.
4. A pilot, who is acquainted with the place of a disaster and with the character for skill of the pilot or steersman in charge of the boat at the time of the disaster, may testify as to whether it was prudent to allow the latter to pilot the boat at the time of the accident.
5. When either party to a cause offers to read a deposition taken therein, he must read the whole of it, except such portions, if any, as are ruled out by the court as inadmissible.
6. A clause in a bill of lading given in behalf of a steamboat for goods shipped on a barge, to the effect that the steamboat and owners "insure the freight shipped on the barge against leaking and sinking," is intended to insure only the seaworthiness of the barge.

Appeal from St. Louis Court of Common Pleas.

The facts sufficiently appear in the opinion of the court.

Knox & Kellogg, for appellant.

I. The owners were liable for a loss caused by the sinking of the barge. The court erred in striking out those portions of the deposition of Credell, in which he stated that he would not on his own responsibility trust Decker to stand on watch. This was clearly competent as the opinion of a skillful pilot, fully acquainted with Decker's skill and competency. Decker's deposition should have been excluded. The evidence clearly shows that the loss was not caused by an unavoidable danger of navigation. Decker was not a competent pilot. The boat was in default, and this delinquency *might* have had an agency in producing the disaster. (11 Mo. 309.) The court erred in refusing the instructions asked by the plaintiff, and in giving those asked by defendant. (See generally 4 Yerg. 48; 5 Yerg. 82; 7 Yerg. 342; 2 Sumn. 571; 1 Murph. 417; 2 Bailey, 161; 1 Wils. 282; 8 Bet. 584; 11 Mo. 306; 2 Stew. & Port. 176; 1 Sumn. 218; 6 Bing. 716; 2 Watts, 114; 4 Binn. 127; Sto. on Bail. § 413, 492, 516; 3 Kent Comm. 220; 6 Cow. 266; 8 Watts & S. 44.)

B. A. Hill, for respondent.

I. The goods on the barge were lost by the unavoidable danger of the river. The instructions put this question to the jury fairly. (See 11 Miss. 299; 5 Yerg. 71; 8 S. & R. 553; 2 Watts, 443; 19 Wend. 234, 251; 21 Wend. 354; 2 Hill, 626; 3 Hill, 1; 17 Wend. 305; 1 Murph. 417; 1 Nott & McC. 170; 21 Wend. 190.) The insurance clause in the bill of lading is not an insurance on cargo but upon freight. (See Toml. Law Dic. tit. Freight; 2 Cranch, 240; 8 Wheat. 505; 7 Cranch, 358; 12 Wheat. 383; 1 Shep. 357; 1 Ired. 236; 3 Sumn. 542; 1 Story, 343; 1 Speer, 321; 9 Leigh, 532; 2 Sto. 81; 2 McLean, 442; 2 Pothier on Obl. 37; Co. Litt. 147 *a*; 4 Dow. P. C. 65; 8 Bingh.

Hill v. Sturgeon & Rawlings.

244; 7 T. R. 423; 3 Dall. 199; 4 Watts, 89; 7 Greenl. 385; 11 East, 312; 4 Camp. 279; 8 Taunt. 260; 15 Mass. 433; 2 B. & Ad. 746; 1 T. R. 638. The clause was designed to insure only the seaworthiness of the barge. The court did not err in striking out portions of the depositions of Fulton and Credell.

RICHARDSON, Judge, delivered the opinion of the court.

The plaintiffs, who were the owners of the steamboat D. S. Stacey, brought their action against the defendants, who were the owners of the steamboat Ironton and the barge John Argent, to recover the value of merchandise shipped by the Stacey on the steamboat Ironton and barge John Argent. A bill of lading in the usual form was executed by Rawlings, master of the Ironton, in which the dangers of the river and of fire were excepted, and to which was added the following clause: "The steamboat Ironton and owners insure the freight shipped on the barge against leaking and sinking." On the 22d of October, 1853, the Stacey stopped at Hat Island, in the Mississippi river, being too heavily laden to bring her cargo over the bars, and for that reason shipped part of her cargo on the Ironton and the barge John Argent to be brought to St. Louis. The river at that time was very low and the navigation difficult and dangerous. It was shown that on the night of the 23d October, 1853, before the moon rose, the Ironton, whilst running up stream in Rozier's Bend, about sixty miles below St. Louis, with two barges in tow, took a sheer to the larboard, on which side the barge Argent was attached, and drifted so abruptly and violently against the bank that the side of the barge was forced in, which caused it to sink, and by that means property of the plaintiff of the value of fifteen thousand dollars was lost. The plaintiffs contend that the goods were lost by the negligence of the defendants in having an unskillful and incompetent pilot at the wheel at the time of the accident; but the defendants insist that the loss was caused by an unavoidable peril of the river.

There was evidence tending to show that, though all boats

Hill v. Sturgeon & Rawlings.

are liable to sheer, boats of the class of the Iron-ton were especially so, and the liability is greater when they have barges in tow and are running at night; that in low stages of the water and difficult parts of the river boats towing barges ought to be conducted by skillful and competent pilots, for, although a boat may sheer and may be injured in the hands of the best pilot, yet all the witnesses agree in saying that pilots of skill and experience are more likely to foresee the causes that produce sheering and thus avoid them, and are more competent to check with facility and promptness a boat that has sheered and thus prevent it from receiving injury; that various causes operate to make a boat sheer, among the known causes of which are shoal water, counter or cross currents, boils in the river, eddies, inequalities of the bottom, narrow channels, rocks or snags, running too near a bar, adverse winds, defective model, improper loading or trimming of a boat, and bad steering; that many of these causes are visible, especially to a practiced eye, and of course are more readily seen and guarded against in the day time than in the night.

There was also evidence tending to show that Credell was the only pilot on board; that he retired about sun-set, telling the captain that it was better not to run the boat after dark until the moon rose, and was in his bed asleep at the time of the accident; also that, after Credell retired, Henry Decker, who was not a pilot but a mere steersman, took charge of the wheel and was steering the boat when the barge sunk; that regular and competent pilots received that season from two hundred to two hundred and fifty dollars per month, but Decker was employed at forty dollars per month, with the privilege of keeping a bar on the boat, which carried no passengers, and that he had made only five or six trips on the river between St. Louis and Cairo as a steersman, whereas, in the opinion of many of the witnesses, it was unsafe to trust a person with that amount of experience to pilot a boat in the night with barges in tow.

It is a rule founded on public policy and convenience that

common carriers are insurers of goods entrusted to them for carriage, and are liable in all events for any loss or damage, unless it happen by some cause or accident for which the law excuses them, or from some cause expressly excepted in the bill of lading; and, when goods are proved to have been delivered to a carrier, the burden is on him to show that he fully performed his contract or that they were lost by one of the excepted perils. The law presumes against him, and he will not be excused by showing that the navigation was difficult or dangerous, or that he employed skillful and competent persons to conduct the boat; but he must discharge himself from liability by showing that the loss occurred in a manner and from a cause that will acquit him. By the common law, all human agency is to be excluded from the cause that produced the injury, and though the usual clause in bills of lading, of "dangers of the river," operates to widen the exceptions, these words only mean the natural accidents incident to river navigation, and do not embrace such as may be avoided by the exercise of that skill, judgment or foresight which are demanded from persons in a particular occupation. (Coggs v. Bernard, 1 Smith's Lea. Cas. 270 and notes.)

The carrier is not only bound to provide a vessel which is tight, staunch and strong, and in all respects fully equipped for the voyage on which he proposes to embark, but he must employ diligent and skillful officers; for he is responsible for damages resulting from a defect of the vessel, or from want of care and attention on the part of her officers, and also from the want of proper knowledge and skill to manage her. It was formerly held that if the carrier was delinquent in any of his duties, and a loss occurred whilst his wrongful act was in operation and force, though it did not remotely contribute to the injury, he could not set up as a defence to the action the bare possibility of a loss if he had been all the time in the line of his duty; but it is now held that he will not be responsible if the loss was wholly independent of his

Hill v. Sturgeon & Rawlings.

default, and, not *might*, but *must*, have happened in any aspect of the case. This is the principle decided by this court in *Collier v. Valentine*, 11 Mo. 309, in which it was held that the carrier "is permitted to show, by way of defence, that, although he may have been in default, yet that the loss was independent of that default and *must* have happened although it had never existed; but a delinquency, which might have contributed to the disaster occasioning the loss, or negligence or carelessness at the time of its occurrence, which might have had an agency in producing it, will render him liable." Human life and valuable property are committed to the honesty, the diligence and skill of the owners and officers of steamboats and other vessels; and as the public have no means of knowing whether the boat or vessel is safe, or whether the officers are competent for their places, their only security is in the vigor of the law and its faithful administration, which hold the carrier to a severe responsibility. He should not be allowed to trifle with the lives and property of others by risking either in unsafe crafts, or by committing them to the mercy of negligent or incompetent officers. And if, at the time the loss happens, the carrier is in the omission of a duty or in the act of doing any thing improper, and the omission or act might have had an agency in causing the damage, he ought not to be permitted to impute to the elements in the dangers of navigation a disaster which may have been the result of his own conduct. If it appear that the sheering of the boat was caused by running too near to the bar on the starboard, or by any other imprudence, or by neglecting any proper measure of precaution, the defendants will be liable. And if it is shown that Decker was not a competent pilot, the plaintiff will not be required to prove affirmatively that the loss resulted from any want of attention or skill on his part at the time of the accident, but the onus will be on the defendants to establish that the loss must have happened if a competent pilot had been at the helm. The defendants are bound to show that the loss was caused by a

peril of the river which could not have been foreseen or prevented by the exercise of skill or diligence; and they can only exonerate themselves by showing that the injury not only might but must have occurred independently of their neglect, and that the presence of Decker at the wheel did not in any manner contribute to it.

The witness should have been allowed to answer the question whether it was proper to suffer Decker to pilot the boat at the time and at the place of the accident. He knew the pilot and the place, and, as an expert, was competent to answer the question.

We see nothing in the objection to the competency of Decker as a witness, or to the propriety of reading his deposition.

The obscurity of the record is such that we do not understand the nature or scope of the objection to the reading of Credell's deposition taken by the defendants. If, however, it is intended to present the point whether a party can read to the jury only such portions of a deposition as suits them, we say that when either party offers to read a deposition which has been taken in the cause, he must read all of it, except, of course, such parts as are decided by the court to be incompetent.

The last clause in the bill of lading, we think, was only intended to insure the seaworthiness of the barge, that it should not leak or sink by reason of its infirmities. It was not designed to insure the goods shipped on the barge from loss that might happen to it by external violence, for such a construction would not only do away with the common law exceptions, but those expressly named in a previous part of the bill of lading.

The other judges concurring, the judgment will be reversed and the cause remanded.

PASTON *et al.*, Respondents, v. BUSSMEYER, Appellant.

1. The third section of the act of 1855 concerning bonds, notes and accounts (R. C. 1855, p. 322), allowing the obligor or maker of a non-negotiable promissory note every just set-off against the assignor existing at the time of the assignment unless it is expressed in the note that it is "for value received, negotiable and payable without defalcation," is not applicable to notes executed before the revised code of 1855 went into effect and made payable "without defalcation or discount," although assigned after said code went into effect.

Appeal from St. Louis Circuit Court.

Krum & Harding, for appellant.

S. T. & A. D. Glover, for respondents.

SCOTT, Judge, delivered the opinion of the court.

This was an action by an assignee on an assigned note for \$836.71, due one day after date, and drawn negotiable and payable without defalcation or discount. The note bore date 25th January, 1856, and was assigned on the 10th day of February, 1857. The defence was a set-off against the payee and assignor before the assignment. The defence was overruled and a judgment was rendered for the plaintiffs. The defendant maintained that as the note did not contain the words "for value received," and, as it was assigned after the act of 1855 (R. C. 1855, p. 319) concerning bonds, notes and accounts had taken effect, it was controlled by the third section of that act, and consequently he had a right to plead a set-off against the payee and assignor.

The case of *Smith v. Ashley*, 20 Mo. 354, determined that the third section of the third article of the practice act of 1849 did not repeal the third section of the act of 1845 concerning bonds and notes. Then, at the date of the note sued on in this section, the act of 1845 was in force. By the third section of that act, as the note was payable "without defalcation or discount," it was not subject to the defence of a set-off at the time it was executed. When the note was

Barret v. Evans.

assigned the act of 1855 had taken effect, and, by the third section of that act, notes drawn in the form of that involved in this controversy were subject to the defence of a set-off against the payee and assignor. The question then is whether notes, not subject to the defence of a set-off when they were made, become subject to such a defence under the third section of the act of 1855.

The defences to which an action on a contract is subject are of the substance of the contract, and are to be determined by the law in force at the time of entering into it. This rule is subject only to the restriction that, as to the time of bringing or form of the action, the laws of the forum will govern. Here was a contract in which one of the parties agreed that in the event of its assignment he would not make a certain defence against it. This stipulation rendered the contract more valuable in the hands of him to whom it was made, and, even had the general assembly power to do so, we will not so construe the act as to make it injuriously affect a contract already in existence. We must construe the third section of the act of 1855 as only intended for contracts which should be made after it went into effect.

Judgment affirmed; Judge Napton concurring. Judge Richardson not sitting.



BARRET, Respondent, v. EVANS, Appellant.

1. Where the endorser of a negotiable promissory note resides within the town or city where protest thereof is made, notice of protest must be served upon him personally, or it must be left at his place of abode or of business; if, however, his residence is outside the city limits, though near the same, and though his address is the city post-office, it is sufficient if notice of protest be deposited, directed to him, in the city post-office.

Appeal from St. Louis Court of Common Pleas.

This was an action against defendant as endorser of a promissory note. The defence relied on was that Evans had

Barret v. Evans.

not received due notice of protest of the note. At the trial it appeared that notice of protest had been given by a letter directed to the defendant Evans and deposited in the St. Louis post-office. Evans at the time of protest lived between two and three miles from the court-house, in St. Louis county, outside the city limits. He had been living at the same place for eighteen years. He was in the habit of getting his letters at the St. Louis post-office. All the other parties to the note lived in the city of St. Louis.

The cause was tried by the court without a jury. The court, at the instance of the plaintiff, gave the following instruction or declaration of law: "If from the evidence the court believe that defendant, at the time the note was protested and notice sent, resided out of the city of St. Louis, but received his letters at the St. Louis post-office, and shall find that the notice of protest and nonpayment was placed in the said post-office directed to defendant at the time and as stated in the protest and certificate of the notary, then the plaintiff is entitled to recover."

The court refused the following, asked by the defendant: "It being shown that all the parties to the note sued on lived in or near St. Louis, the notice of protest should have been served on defendant personally or left at his residence in order to charge him as endorser; and it was not sufficient to leave a copy of the notice at the St. Louis post-office directed to defendant."

The court found and rendered judgment for plaintiff.

T. C. Johnson, for plaintiff.

I. The notice was not sufficient to fix the liability of defendant as endorser. He was entitled to personal notice or notice left at his dwelling. Notice through the post-office is not good except where the notice is deposited to be transmitted to another post-office. (4 Hill, 133; 2 Hill, 587; 5 Metc. 352, 492; 3 Harring. 419; 15 Maine, 143; 8 W. & S. 138; 5 Louis. 359; 6 Louis. 506; 5 Mart., N. S., 359.)

Thomas & Sharp, for respondent.

Harney v. Scott.

SCOTT, Judge, delivered the opinion of the court.

The question in this case is whether the endorsee of a negotiable promissory note, whose residence is near but outside of the limits of the city of St. Louis, and whose post-office is the city office, can be served with notice of the protest of the note through his post-office, which is that of the city.

This case finds authority in the books for deciding it either way. Under such circumstances we are at liberty to adopt that course which seems most conducive to uniformity in the law, and which will produce the least litigation and strife. Where the party to be served is a resident of the city or town where the protest is made, the course required is to give him personal notice, or to leave it at his dwelling or place of business. But if he lives in the country, then a notice by mail to his post-office will be sufficient. Now as the party in this case lived in the country outside of the city, why should not a notice through his post-office be sufficient? If we once depart from the city limits as the rule as to residence, where shall we go? How far out must the party be to deprive him of a personal notice or its equivalent. This must lead to dispute. The other rule is preferable for its certainty, as it leaves no ground for controversy. In an old case, the course adopted here was pursued in relation to giving notice to one outside but near the city of St. Louis. It seems that no exception was taken to it in that case. (*Walker v. The Bank of Missouri*, 8 Mo. 704.) We do not deem it necessary to state and review the cases on this question. There is ample authority for the opinion we have expressed.

The other judges concur. Affirmed.

HARNEY, Appellant, v. SCOTT, Respondent.

1. An appeal will lie from an order of a probate court revoking letters of administration; the appeal will not, however, operate a suspension of the effect of the order.

Harney v. Scott.

Appeal from St. Louis Court of Common Pleas.

This was an action to recover the hire of a certain slave alleged to have been hired by the plaintiff to defendant, and the value of certain other slaves alleged to have been wrongfully taken and converted by the defendant. Harney, the plaintiff, was appointed administrator *de bonis non* of the estate of Milton Duty, deceased. The slaves in controversy belonged to said estate. Harney, while such administrator, hired one of said slaves to the firm of Scott & Whitelaw, of which defendant Scott was a member. A will being afterwards produced and admitted to probate, the probate court made an order revoking Harney's letters, and letters of administration were granted to the defendant Scott, who thereupon took possession of the other slaves mentioned in the petition. Harney appealed from the order of the probate court revoking his letters, and this appeal was pending at the time this cause was heard in the court of common pleas. Instructions were given and refused against the objection of the plaintiff; he submitted to a nonsuit, with leave, &c.

Krum & Harding, for appellant.

I. The contract for the hire of the negro was made with the plaintiff in his individual capacity. The instruction No. 1 given is erroneous. (7 Mo. 351; 9 Mo. 377; 15 Mo. 89.) The appeal taken by the plaintiff from the order of the probate court revoking his letters of administration suspended the operation of that order so long as the appeal was pending and undetermined. The right of plaintiff to hold possession or sue for any of the property in question was not affected by said order. *Prima facie* plaintiff was entitled to the possession of the negroes.

Hart and Biddlecome, for respondent.

RICHARDSON, Judge, delivered the opinion of the court.

The only question in this case is whether the appeal, taken by the plaintiff, from the order of the probate court revoking

Syme v. Steamboat Indiana.

his letters of administration, suspended the effect of the order. The point was decided in *Mullanphy v. County Court of St. Louis County*, 6 Mo. 563, and is decisive of this case.

Judge Napton concurring, the judgment will be affirmed.



SYME *et al.*, Respondents, v. STEAMBOAT INDIANA, Appellant.

1. The objection that a petition does not state facts constituting a cause of action is not waived by a failure to take the same by demurrer; the defendant may make the same by motion for new trial, or may at the trial oppose on this ground the introduction of evidence on the part of the plaintiff.

Appeal from St. Louis Circuit Court.

The petition in this case is as follows: "Plaintiffs state that they have a demand against said steamboat Indiana, amounting to the sum of \$323.39, damages and charges, for that the master of said boat, as also Stoops, clerk of said boat, in navigating the waters of this state, undertook and agreed by his certain writing, which is hereto annexed and made part hereof, signed by said clerk in behalf of said boat, to carry and transport certain goods, wares and merchandise, the property of plaintiffs, to-wit, one case of merchandise, from the port of New Orleans, Louisiana, to the port of St. Louis, Missouri, as by said writing, now produced or ready to be produced, will more fully appear, and as also appears by the bill of lading now or hereafter to be produced; and the said plaintiffs say that although sufficient time has elapsed for the due performance of said agreement, the said master and clerk of said steamboat have hitherto wholly neglected and refused to perform the same, to the plaintiffs' damage as aforesaid. And said plaintiffs say that the said demand, in all its particulars as above stated, accrued against said steamboat within six months next preceding the filing of this complaint."

Neither the writing described in the petition nor the bill

Syme v. Steamboat Indiana.

of lading referred to was annexed thereto. At the trial, the defendant objected to the introduction of any evidence in the cause on the part of the plaintiffs on the ground that the petition did not state facts sufficient to constitute a cause of action. The court overruled the objection. The jury found for the plaintiffs. The defendant moved the court to grant a new trial upon the ground, among others, that the petition did not state facts sufficient to constitute a cause of action.

Bland & Coleman, for appellant.

I. The defendant may, upon the trial of an action, take the objection that the petition does not state facts sufficient to constitute a cause of action. It is the duty of the court to hear and determine such an objection. (R. C. 1855, p. 1231; 7 Barb. 581; 9 Barb. 158; 19 Barb. 186; 3 Seld. 459; 3 Seld. 576.) The petition does not allege that the defendant is a vessel used in navigating the waters of this state, or in any manner aver any facts giving the court jurisdiction in the premises. It does not state that the defendant was a common carrier. It does not state that defendant did receive or was to receive any compensation for the transportation of the goods. (23 Mo. 432; 24 Mo. 80; 9 Barb. 158.) The court erred in refusing the instruction asked by the defendant, and in instructing the jury, and in overruling the motion for a new trial.

Carroll, for respondents.

I. It is too late to object to the form of the petition at the trial. If defendant wished to assail the petition, a demurrer should have been filed. (See R. C. 1855, p. 1255, § 19.)

RICHARDSON, Judge, delivered the opinion of the court.

The only question in this case is whether the petition is sufficient to support the judgment. It will be observed that the petition omits to charge that the defendant was a common carrier or that the goods were ever received, or that the defendant had converted them, or that there was any con-

sideration for the alleged undertaking. The defendant did not demur, but in the answer denied the allegations in the petition, and took the objection, on the trial, that the petition did not state facts sufficient to constitute a cause of action, and opposed the introduction of any evidence on the part of the plaintiffs.

If the petition had averred that the defendant was a common carrier, then, in consequence of the public employment voluntarily assumed, the boat would not only have been bound to receive the goods offered for carriage, but to have transported them to St. Louis, and, though no special contract had been made to pay a certain sum, it could have been safely averred that the undertaking was for a reasonable reward, as the right to compensation would have existed. But the petition states no fact that imposed any obligation on the defendant, and it omits the averment of any circumstances to distinguish the case from an ordinary gratuitous bailment. It does not even allege that the defendant ever received the goods, but only states a promise without any consideration to carry them.

The defendant might have demurred successfully to the petition. But the right to object at the trial, or on a motion in arrest, was not waived by the omission to demur, for the statute expressly provides that the objection, that the petition does not state facts sufficient to constitute a cause of action, is not waived by a failure to demur. (2 R. C. 1855, p. 1231; *Andrews v. Lynch*, 27 Mo. 167; *Welch v. Bryan*, 28 Mo. 30; *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 464; *Gould v. Glass*, 19 Barb. 185.) It is not necessary for a party to prove more than he alleges, and it can not be supposed that a cause of action has been proved when none is stated.

With the concurrence of the other judges, the judgment will be reversed and the cause remanded.

CUNNINGHAM, Respondent, v. STEAMBOAT LOW-WATER, Appellant.

1. Where a hand, employed on a steamboat for a trip at certain agreed wages per month, is, without cause, discharged before the termination of the trip, he may recover compensation at the agreed wages for a trip of the usual length; if the trip should be extended by accident beyond the usual period, he could not recover full wages for the whole time including the accidental detention.

Appeal from St. Louis Law Commissioner's Court.

This was an action against the steamboat Low-Water to recover "one trip's wages as a rousabout," alleged to be due plaintiff. The second instruction referred to in the opinion is as follows: "If the jury believe that the plaintiff was hired for the trip and was put off the boat without fault and without his consent, then he is entitled to recover for the full trip, and the amount paid to the plaintiff at St. Charles is no bar to the suit, unless it was received by the plaintiff as a settlement in full for the trip or time for which he was hired, but is a credit on his claim of the amount received."

S. H. Gardner and Jecko, for appellant.

I. Under the statute the boat was only liable "for work done or services rendered on board the same." Plaintiff was paid for all the services actually rendered. (16 Mo. 266; 19 Mo. 476.) If the doctrine laid down in the instruction given be correct, the plaintiff could have recovered wages until the boat returned to St. Louis, even had she been detained up the Missouri for six months.

Kellam, for respondent.

NAPTON, Judge, delivered the opinion of the court.

The second instruction which the court gave in this case, although a correct exposition of the law generally, was not, we think, proper under the circumstances. There was evidence to show that, by an accident to her machinery, the

Renick & Peterson v. Robbins.

boat was detained some eight days beyond the usual period of her trips, and the instruction should have limited the recovery to full wages for a successful trip of the ordinary length. (The Elizabeth, 2 Dodson's Ad. R. 403.)

The instruction which was asked on behalf of the boat, directing the jury to deduct wages which were earned or might have been earned on other boats, was properly refused, because there was no evidence given to show that such wages were obtained or could have been obtained.

We merely refer to the opinion of the court in the case of Th. Grant v. The Steamboat Maria Denning, for our opinion upon the points presented by the other instructions. (See ante, p. 280.)

The other judges concur. Judgment reversed and cause remanded.



RENICK & PETERSON, Respondents, v. ROBBINS, Appellant.

1. The notary who presents and protests a bill of exchange for nonpayment is authorized to give notice to the various parties to the bill.
2. No particular form of notice is required; it is sufficient if the words employed, either in express terms or by necessary implication, give identity to the bill and information that it has not been accepted or paid upon due presentment.

Appeal from St. Louis Court of Common Pleas.

Grover, for appellant.

Gantt, for respondent.

RICHARDSON, Judge, delivered the opinion of the court.

This case was tried without a jury and without instructions, and the only exceptions taken during the progress of the trial were to the decisions of the court in refusing to exclude portions of the deposition of Latham. It appears

Renick & Peterson v. Robbins.

from the bill of exceptions that the plaintiff read, from the published statutes of Louisiana, a law of that state, which authorized notaries public in New Orleans to appoint one or more deputies to assist them in the making of protests and delivery of notices of protests of bills of exchange and promissory notes; and, conceding that the written law of another state can not be proved by parol evidence or by a witness not shown to be competent to testify on such subjects, the judgment should not for that reason alone be reversed; for, though the evidence was incompetent to establish the fact sought to be proved by it, it was undoubtedly established by other competent testimony.

The notices of the dishonor of the bill were given by the notary, who presented it for payment and protested it for nonpayment. A notice given by a mere stranger is a nullity, but the notary who presents and protests the bills is regarded, to a certain extent, as the agent of the holder, and is authorized, by his character and employment, to give notice to any of the other parties on the bill. The object of notice is to advise the drawer or endorser of the fact that the bill has been dishonored, but no particular form is required for that purpose, and it is sufficient if the words employed, either in express terms or by necessary implication, give identity to the bill and information that it has not been accepted or paid on due presentment. A misdescription of the bill will not vitiate the notice, unless it misleads the party notified, and "unless the variance is such that, under the circumstances of the case, the notice conveys no sufficient knowledge to the drawer or endorser of the identity of the particular note or bill which had been dishonored." (Edwards, Bills & Prom. Notes, 471, 588-9.)

The cases are conflicting on the point whether the sufficiency of a written notice is a question of law to be decided by the court, or whether in the case of a misdescription of the bill it should be left to the jury to say whether the party had been misled. In some instances it becomes a mixed

Cline & Jamison v. Brainard.

question of law and fact. But it is unnecessary now to discuss the doctrine, as both the law and the facts in this case were submitted to the court. The other judges concurring, the judgment will be affirmed.



CLINE & JAMISON, Respondents, v. BRAINARD *et al.*, Appellants.

1. Where an application is made for a continuance on the ground of the absence of a material witness, it must appear from the accompanying affidavit that the applicant had used due diligence to procure the testimony of such absentee.

Appeal from St. Louis Circuit Court.

McClellan, Moody & Hillyer, for appellants.

Cline & Jamison, for respondents.

RICHARDSON, Judge, delivered the opinion of the court.

The only error assigned in this case is the refusal of the court to continue the cause on the defendant's application. The action was founded upon a promissory note, and the summons—which was returnable to the October term, 1857, of the circuit court—was personally served on the defendant on the 18th day of the preceding September. When the cause was called for trial on the first day of December following, the defendant applied for a continuance, and presented his affidavit, in which the reasons for the application are stated, which were that he could not safely go into trial without the testimony of Henry Holmes, who had lately resided in St. Louis, but was then absent in Texas, where he then resided; that his testimony was material and could not be supplied by any other witness; that on the 28th of November, 1857, he caused a subpoena to be issued for said Holmes, which the sheriff had returned *non est*, and that since he learned of the absence of Holmes he had not had time to give

Lucas v. Ladew.

the requisite notice and take his deposition, but expected to procure his deposition in time for the trial at the succeeding term.

In our opinion, the application for a continuance was properly overruled. Nothing is stated in the affidavit inconsistent with the idea that the defendant knew of the intention of Holmes to remove from the state long before he left. He does not state when he left, or that he left without his knowledge, or too soon after he heard of his purpose to leave to take his deposition. He only says that he had no time to take his deposition after he went to Texas. The cause was pending more than two months, and the defendant may have known all the time up to a few days before the trial, that the witness expected to go out of the state. The other judges concurring, the judgment will be affirmed.



LUCAS *et al.*, Respondents, v. LADEW *et al.*, Appellants.

1. Upon the protest for *non acceptance* of a sight bill of exchange entitled to days of grace and the giving of notices to the drawer and endorsers, their liability to the holder is immediately fixed; it is not necessary that the bill should be presented for payment on the last day of grace.
2. Although days of grace upon sight bills have been abolished by statute in this state, it will be presumed, in the absence of proof of change by legislative enactments, that the common law, allowing days of grace upon such bills, is the law of a sister state or a territory of the United States.

Appeal from St. Louis Court of Common Pleas.

This was an action by plaintiffs as endorsers of a bill of exchange, payable at sight, drawn at New York by one B. F. Maniere on Smoot, Russell & Co., at Leavenworth city, in Kansas territory, in favor of John Dorsey, and by him endorsed to defendants and by them endorsed to plaintiffs. It appeared that when the bill was endorsed over to the plaintiffs they sent it to Smoot, Russell & Co. (who were their business correspondents in Leavenworth city) for collection; that the latter caused it to be protested for *non acceptance* on

the 17th of March and for *non payment* on the 21st of March. A correspondence ensued between plaintiffs and Smoot, Russell & Co., in reference to the liability of the latter to plaintiffs for the amount of the bill by reason of Smoot, Russell & Co.'s not having caused the bill to be protested for nonpayment on the last day of grace, that is, on the 20th instead of the 21st day of March. Smoot, Russell & Co. finally agreed to leave in the hands of plaintiff, during the pendency of a suit on the bill by plaintiffs against defendants, an amount sufficient to pay the same if plaintiffs should fail to recover of defendants, and to be responsible for all costs of the suit and for attorney's fees in prosecuting the same.

At the request of the plaintiffs, the court gave the following instruction: "The presentation of the bill sued on to the drawees for acceptance on the 17th day of March, 1857, their refusal to accept, the protest of the bill for non acceptance on that day, and notice then to the defendants of the non acceptance, being admitted in the pleadings, their liability as endorsers of the bill was, by those admitted facts, fixed, and the subsequent protest of the bill on the 21st of March had no effect to discharge that liability."

At the request of the defendants the court gave the following instruction: "If Smoot, Russell & Co. had paid to the plaintiffs the amount, and this suit is prosecuted by plaintiffs for the sole use and benefit of Smoot, Russell & Co., then the court sitting as a jury ought to find for defendants."

The defendants asked the court to give the following instruction, which was refused: "If the bill of exchange read in evidence was not presented to Smoot, Russell & Co., for payment and protested until four days after it was presented for acceptance, and that at the time it was presented for acceptance no demand was made for the payment thereof, but Smoot, Russell & Co., acting as the agents of the plaintiffs at that time, and as such agents directed said note not to be presented or protested for nonpayment on the day it was pre-

sented for acceptance, this discharges the defendants from liability to the plaintiffs."

The court sitting as a jury tried the cause and found for the plaintiffs.

H. N. Hart, for appellants.

I. The instruction given for the plaintiffs was erroneous. If the draft was entitled to grace after presentment, then surely the 21st was one day over grace, and the endorsers were released; if the draft was payable on the day it was received by Smoot, Russell & Co., then a demand of payment on that day was necessary, and, in case of refusal, a protest for nonpayment must be made on that day. Smoot, Russell & Co. directed the notary to protest the bill for non acceptance on the 17th of March, and then to hold it until it matured. The notary mistook the day of maturity. The court further erred in refusing to admit Mr. Drake's opinion. It did not come within the rule as to confidential communications between counsel and client.

Drake, for respondents.

I. The count properly excluded the legal opinion given by Mr. Drake to the plaintiffs. The liability of the defendants as endorsers was fixed upon the protest for non acceptance and the notice thereof. The second instruction asked by the defendants and refused was rightly refused. It assumed that the bill was payable strictly at sight without days of grace, and should therefore have been protested for non payment on the day it was first presented to the drawees, instead of for non acceptance. At common law a bill payable at sight was entitled to days of grace. (Story on Bills, § 343.) In the absence of proof to the contrary, the common law must be held to have prevailed in Kansas. The bill was entitled to days of grace. (8 Mo. 7; Johnson v. Dicken, 25 Mo. 582; Abell v. Douglass, 4 Denio, 305; 1 Pick. 415; Stout v. Wood, 1 Blackf. 71; 15 Ill. 263; 25 Ala. 540.)

NAPTON, Judge, delivered the opinion of the court.

The instructions upon which this case was tried were, in our opinion, correct. It is well settled, both in England and America, that, upon protest for non acceptance and notice, the drawer and endorsers of a bill are responsible immediately to the holder, and the failure to present the bill again for payment has no effect in discharging that liability. Whether the bill in this case was presented for payment on the 20th or 21st was therefore immaterial, as it was presented for acceptance on the 17th and acceptance was refused, and it was duly protested and notice sent immediately to the defendants. (Story on Bills, § 321, 322, 366; Watson v. Turpley, 18 How. 517; Renshaw v. Triplett, 23 Mo. 213.)

By the common law, bills payable at sight are entitled to days of grace, and although grace upon sight bills is abolished by our statute (R. C. 1855, p. 298, § 18), yet we presume the common law to prevail in a sister state or territory, in the absence of proof of any change by legislative enactments. (Houghtaling v. Ball, 19 Mo. 84; Abell v. Douglass, 4 Denio, 375; Stout v. Wood, 1 Blackf. 71; Ellis v. White, 25 Ala. 504.) As the bill sued on was entitled to grace, the instruction asked by the defendants was properly refused.

The opinion of Mr. Drake, the plaintiffs' attorney, in relation to the liability of Smoot, Russell & Co., was properly excluded, not because there was any thing of a confidential nature in it, but because it was an *opinion* and therefore had nothing to do with the case.

Whether Lucas & Co. had collected the bill from Smoot, R. & Co. and were acting as mere agents of the latter in this suit, was submitted to the jury at the request of the defendants. We do not consider the plaintiffs as necessarily occupying such a position from the mere fact of their retaining a balance in their hands sufficient to cover the bill, with the consent of S., R. & Co., nor from the additional fact that S., R. & Co. agreed to pay the bill if the plaintiffs should not succeed in holding the defendants liable, and this is the most

Harrison's Adm'r v. Hastings.

which the correspondence between the parties would appear to establish. But this was a question of fact upon which the jury have passed, and there is certainly no ground for disturbing their verdict.

The other judges concurring, the judgment is affirmed.



HARRISON'S ADMINISTRATOR, Respondent, v. HASTINGS *et al.*,
Appellants.

1. A defendant will not be permitted at the trial of a cause to amend by denying facts admitted in his answer.

Appeal from St. Louis Court of Common Pleas.

D. C. Woods, for appellants.

A. M. Gardner, for respondent.

RICHARDSON, Judge, delivered the opinion of the court.

The payee and endorser of the note sued on made a written contract with the defendants, by which he agreed to cause two balloon ascensions to be made at Boonville on the first and fourth days of October, 1855, and also to give two exhibitions of fire-works—one on each of said days. The defendants agreed to pay Peckham, for the two balloon ascensions and exhibitions of fire-works, eight hundred dollars, for which they executed and delivered their two negotiable promissory notes, each for four hundred dollars, the note described in the petition being one of them. It was further stipulated in the contract that "it is understood by the parties that each balloon ascension is to be at the rate of two hundred and seventy-five dollars, and each exhibition of fire-works is to be at the rate of one hundred and twenty-five dollars." Both of the notes were endorsed for value to the plaintiffs' intestate before they matured. The defendants admitted in their answer that Peckham caused to be made one balloon ascension and one exhibition of fire-works, but

Gregg v. Robbins.

set up as a defence a failure of the consideration of the note sued on, although the other note had been surrendered to them. One of the witnesses on the trial stated that only one ascension was attempted, which he considered a failure. At the close of the testimony the defendants asked leave to amend their answer so as to make it conform to the evidence, but the court refused leave.

By the agreement of the parties the consideration of each note was kept separate and distinct, and consequently the failure of the consideration of one note did not affect the right to maintain an action on the other. The answer concedes that there was a consideration for the note sued on, for it admits that there was one balloon ascension and one exhibition of fire-works. There is no pretence in the answer that the entire consideration of both notes had failed, and by their own admission they were not damaged by the failure of the consideration of the other note as it was delivered up to them. We think the court properly refused the instructions asked by the defendants, and correctly stated the law in the instruction that was given.

There was no error in refusing permission to amend. The only ground for the amendment was the evidence of a witness disclosed at the trial, and the party sought by an amendment to deny a fact which was admitted in the answer.

The other judges concurring, the judgment will be affirmed.



GREGG, Appellant, v. ROBBINS, Respondent.

1. The master of a steamboat has no authority, as master, to bind the boat or its owners by a promissory note.
2. The cause of action set forth in a petition must be supported by the evidence, otherwise there will be a fatal variance.

Appeal from St. Louis Court of Common Pleas.

Plaintiff states in his petition in substance that the defendant owes him two hundred and eighty dollars with interest

Gregg v. Robbins.

from October 3, 1856, for services rendered the defendant by the plaintiff as pilot on defendant's boat; that on the 3d day of September, 1856, "James F. Smith, the master of defendant's boat, being duly authorized in that behalf, accounted with the plaintiff, and the sum then found to be due to the plaintiff for his services rendered on the defendant's boat was two hundred and eighty dollars, for which sum the said Smith, on behalf of the owners of the steamboat Editor, (which boat was then owned by defendant,) executed and delivered to the plaintiff a note for said sum, payable in thirty days after date, which sum with interest is still due the plaintiff, together with interest from October 3, 1856; and for which he asks judgment. The plaintiff annexes the said note to this petition."

Testimony was introduced at the trial showing that James F. Smith, the master of the steamboat Editor, of which the defendant Robbins was owner, hired the plaintiff Gregg to serve as pilot for the season of five months, at three hundred dollars per month; that plaintiff continued on board said boat rendering service as pilot from the time of hiring in April, 1856, until about the 1st of July, 1856, at which time the boat lay up. By the terms of the agreement, the plaintiff was to find employment elsewhere in case the boat should stop running, and his earnings on other boats were to be credited on his contract. When the Editor lay up, the plaintiff was paid his wages up to that time. After the expiration of the time of hiring—five months—the plaintiff and the said Smith, as master of the boat, made a settlement and found the balance due plaintiff under the above mentioned contract to be two hundred and eighty dollars, after deducting the amount plaintiff had earned on other boats. For this balance the said captain gave to plaintiff the following note: "Thirty days after date, I promise to pay Benj. Gregg or order, two hundred and eighty dollars. Balance due for for services rend. St. Louis, September 3, 1856. [Signed] Steamer Editor and owners, per J. F. Smith, master." The master further testified that this note was executed by him

Gregg v. Robbins.

without any authority from Robbins, and that it was given for the unexpired term of the contract and not for services actually rendered. There was also evidence tending to show that Robbins was present when Smith made the contract with the plaintiff, and participated in making it.

The court, at the request of defendant, instructed the jury as follows: "The jury is instructed that the plaintiff has offered no proof tending to show that the note sued on was executed by the plaintiff or any one authorized by him to execute the same, and the said note is not in evidence before them, and they should therefore find for defendant."*

The court refused the following instruction asked by plaintiff: "1. If the jury believe from the evidence that Smith, the master of the boat of which defendant was owner, in presence of defendant and with his consent, employed plaintiff as pilot on said boat for five months, they will find for plaintiff the balance that may be due under said contract. 2. If the jury believe from the evidence that the plaintiff was employed by Smith, the master of the steamboat *Editor*, with the consent and in the presence of Solomon H. Robbins, the defendant, and owner of said boat, and that the note mentioned was given by said Smith as master on account of and under said contract for a balance due under the same, they will find for plaintiff."

The plaintiff took a nonsuit, with leave, &c.

Hudson & Thomas and *Hayden*, for appellant.

I. This action was not brought on the note. Even if it were, the proof would sustain the action. (*Sanders v. Anderson*, 21 Mo. 402.) The instruction given was clearly wrong. It excluded material testimony from the jury. There was evidence tending to show that the master had authority to execute the note or due bill. The master, as such, has authority to bind the owners by his statement or note. (21 Mo. 402; 6 Mo. 552.) Robbins was present and took part in making the contract. It was the owner's contract. Some services were rendered, and plaintiff was ready to render the

rest. In the view of the parties, it was the same as if the services had been rendered. It was not the plaintiff's but defendant's fault that the complete service was not done. Defendant's agent, the master, chose to consider it as services actually rendered, and so expressly stated in the due bill. In legal intendment the services were rendered. There is no variance between the *allegata* and *probata*. (21 Mo. 402.) This action is brought upon the account stated by the master under the contract made by the owner, not on the note as a note. (See Story on Agency, § 116, 121, 294; 300; Abbott on Shipping, 734, 794; Curtis on Merch. Seamen, 14, 18, 328; 4 Pick. 298; 11 Johns. 72; Gilp. 592; 3 Sumn. 286.)

Grover and Lindenbower, for respondent.

I. The action was really founded upon the note. It was properly excluded from the jury. The master had no authority to make the note. There was no proof tending to establish any cause of action set out in the petition. (See 10 Metc. 375; 3 Sto. C. C. 675; 16 Conn. 489; 2 Engl. L. & Eq. 337; 3 Johns. 518; 25 Mo. 99.)

RICHARDSON, Judge, delivered the opinion of the court.

It is not material to decide whether the action is upon a promissory note or on an account for services rendered; for if the petition is on the note, then there is no proof that the master of the boat had authority to bind the owner in that manner, and authority for that purpose would not be implied from the relation that subsisted between the master and the owner. If the action is on account of services actually rendered, the plaintiff was not entitled to recover on his petition, as the proof showed he had been fully paid for all the services he performed. The evidence tended to show a special contract, which would have entitled the plaintiff to a verdict if he had declared on it; but the variance between the proof and petition was so great that the plaintiff had no right to go to the jury without an amendment, which he did not ask.

Judgment will be affirmed.

Lancaster v. Woodboat Hardin.

SCOTT, Judge, dissenting. As the action of the court was calculated to take the party by surprise, there should have been allowed to the plaintiff the privilege of amending his petition. The judgment, in my opinion, should be reversed.

LANCASTER, Plaintiff in Error, v. WOODBOAT HARDIN, Defendant in Error.

1. The master or clerk of a boat can not enforce a claim for wages due for services rendered on board thereof by a proceeding *in rem* under the boat and vessel act. (R. C. 1855, p. 303.)
2. This rule applies to the "foreman" of a woodboat acting in the capacity of master.

Appeal from St. Louis Circuit Court.

D. C. Woods, for plaintiff in error.

I. Woodboats are included in the boat and vessel act. The foreman or mate was not master. The boat was not in the habit of carrying passengers and freight. (See 10 Mo. 531.) A proceeding *in rem* would lie against the boat to enforce the payment of the wages of such foreman. (2 P. Wms. 367; 11 Pet. 175; 8 S. & R. 118; Abbott on Ship. 196, 822.)

Peacock, for defendant in error.

I. The demurrer was properly sustained. Plaintiff was the actual commander or master of the boat. Calling him a foreman is an attempt to evade the statute.

RICHARDSON, Judge, delivered the opinion of the court.

The plaintiff states, in his amended petition, that the defendant was used exclusively in the transportation of wood from places on the Illinois river to the port of St. Louis, where the owners were engaged in the wood business, and that they employed him "as foreman to superintend the hands on board, and to exercise a general control of the boat," for which they agreed to pay him fifty dollars per

month; that he worked ninety days in that capacity and received forty-two dollars; and asked judgment for the balance due to him. A demurrer to the petition was filed and sustained on the ground that the plaintiff's demand was not a lien on the boat.

The remedy in the state courts against boats or vessels by name is purely statutory, and a demand against a boat can not be enforced by a proceeding *in rem*, unless it is within the provisions of the statute. A lien is given for "all wages due to hands or persons employed on board such boat or vessel for work done or services rendered on board the same, except for wages which may be due to the master or clerk thereof." But the petition shows that the plaintiff as "foreman," performed the duties of master and really was the master, and, as such, whether called "foreman," captain or by any other name, was not entitled to a lien. The master of a vessel has no remedy in admiralty for his wages *in rem*, for the reason, perhaps, that he has generally the means of paying himself in his own hands; and, though it might appear in a given case that the reason of the rule had failed, the rule itself would not be relaxed. It may be that the plaintiff will lose his debt, unless he can collect it in the way he proposes, but he is in no worse condition than any other creditor who looks to the individual responsibility of his debtor. Cases may arise, not embraced by the statute, whose equity is superior to those which are expressly provided for, but, because the legislature has omitted them, the courts have no authority to enlarge the provision of the statute. The other judges concurring, the judgment will be affirmed.



MILLER *et al.*, Respondents, v. BASCOM, Appellant.

1. Where there is a reservation or limitation of personal property by way of condition, reservation or remainder, or otherwise, the same not being declared by will or deed duly proved or acknowledged and recorded, such reservation will not, by the operation of the fifth section of the act con-

Miller v. Bascom.

- cerning fraudulent conveyances (R. C. 1855, p. 803), be rendered void as to the creditors and purchasers of the person in possession, unless such possession shall have continued for the space of five years.
2. Where personal property is sold and delivered to a person with the understanding that it is to remain the property of the vendor until the purchase money is paid, this "reservation or limitation" in favor of the vendor is not invalidated by the operation of the fifth section of the act concerning fraudulent conveyance, by reason of a failure to declare the same by will or deed duly proved or acknowledged and recorded; said section has no such operation unless possession has continued for five years.
 3. Layson v. Rogers, 24 Mo. 192, explained and modified.
 4. The mere fact, that the grantor in a deed of trust which is recorded remains in possession of the trust property, is no evidence of fraud; the record is in such case equivalent to a transmutation of possession.

Appeal from St. Louis Court of Common Pleas.

This was an action for the possession of a mirror. Evidence was introduced tending to show that the mirror was sold by plaintiffs to one Hyde, under the understanding and upon the condition that the mirror was to become the property of Hyde if he should pay for it; until he should so pay, the mirror was to remain the property of the plaintiffs. He did not pay for it, but executed a deed of trust, embracing said mirror with other property, to secure indebtedness to third persons. Under this deed of trust a sale was made, and Bascom, the defendant, became the purchaser of the mirror. He purchased with notice of the rights of the plaintiffs. The cause was tried by the court without a jury. The defendant asked the court to instruct as follows: "1. If the court, sitting as a jury, shall believe from the evidence that the sale of the mirrors in question made by plaintiff to one Hyde was made with a reservation or limitation by way of condition, reservation or remainder, and that the possession of the property remained with the said Hyde up to the time of the sale by the trustee, Shands, from the time the same was delivered by plaintiffs to said Hyde, then the condition or limitation, if any, in the said sale by plaintiffs to said Hyde, as to all creditors and purchasers of the said Hyde, was void, and the plaintiffs can not recover in this action unless

Miller v. Bascom.

such reservation of said property was declared by will or deed in writing proved or acknowledged and recorded according to law. 2. That if the said Bascom was a purchaser at trustee's sale under a deed of trust executed by Hyde, who was in the possession of the said mirrors at the time said deed was executed, then said Bascom will hold the said property against the plaintiffs, even although he had verbal notice of the claim of said plaintiffs." The court refused so to instruct, and found for the plaintiffs.

Morehead and Carroll, for appellant.

I. The court erred in refusing the instructions asked. The reservation or limitation was void. (See R. C. 1855, p. 808, § 5; *Layson v. Rogers*, 24 Mo. 192; *Bryson v. Penix*, 18 Mo. 18; 12 Mo. 379.)

H. N. Hart, for respondents.

SCOTT, Judge, delivered the opinion of the court.

Without determining the question whether the contract proved by the plaintiffs, that the mirrors were to be the property of the plaintiffs until they were paid for, created a reservation or limitation of any use or property by the way of condition, reversion or remainder, within the meaning of the fifth section of the act concerning fraudulent conveyances, we are of the opinion that the section, to which reference has been made, does not apply to the case under consideration, as the possession of the property had not remained five years in the possession of Hyde at the time of sale.

There is no doubt but that, in case of a loan, the property must remain in the possession of the loanee five years before he can acquire a title, as against the owner, subject to the claims of his creditors and purchasers. This is so clear by the words of the section that no question can arise as to it. Now, where there is a claim of property by way of condition, reversion or remainder, is the same length of possession

necessary to vest in the person in possession a good title in favor of his creditors and purchasers?

The original law on this subject was taken from the code of Virginia, where it had long existed, and was at an early day introduced amongst us, as we find it in the territorial laws (1 Terr. Laws, 440); and, as we find it there, so it continued until the revision in 1835, when the words "as aforesaid" were omitted. The statutes of Virginia and Kentucky both contain these words, and they are to be found in the law on the subject in our revision of 1825. The law as originally introduced among us was, "where any goods or chattels shall be pretended to have been loaned to any person, with whom, or those claiming under him, possession shall have remained for the space of five years, without demand made and pursued by due process of law on the part of the pretended lender; or where any reservation or limitation shall be pretended to have been made of any use or property by the way of condition, reversion or remainder or otherwise in goods and chattels, the possession whereof shall have remained in another *as aforesaid*, the same shall be taken as to the creditors and purchasers of the persons aforesaid so remaining in possession to be fraudulent within this act, unless such loan or reservation of property be declared by will or deed in writing duly recorded," &c.

It has been seen that, in the revision of 1835, the words "as aforesaid" were omitted, and the omission still remains, and we are called upon to determine whether the omission was intentional and suffered with an intent to change the law so as to make any length of possession, however short, in the person in possession, create a title in favor of his creditors and purchasers, instead of a possession of five years as in the case of a loan. We can see no reason for making any discrimination between a loan and a condition or reservation. The mischief of continuing in possession under one pretext is as great as the mischief under the other. If a bare possession under a condition or reservation, without regard to

its duration, will work a change of property in favor of the possessor, then in many instances the property of the real owner will be taken to satisfy debts which could not have been contracted on the faith of property in the possession of the debtor, for the debt will have been contracted before the possession of the property came to the debtor. This would be directly against the object and purposes of the act. In the case of *Layson v. Rogers*, 24 Mo. 192, the words "as aforesaid" in the act were evidently overlooked, and it is clear that by those words a reservation or condition is put upon the same footing as a loan, and so it has been held in Virginia whence we have this statute. (*Loudon v. Turner*, 11 Leigh, 403.)

Whether wisely or unwisely, it is well known that the revision of 1835 was made to undergo a purgation of all words deemed unnecessary and of all useless verbiage, and it is more than probable that, under such a process, words are inadvertently omitted which were necessary to express fully the sense of the general assembly.

As the case is in our opinion not within the fifth section of the act concerning fraudulent conveyances, the court committed no error in refusing the instruction asked on the subject of a reservation or limitation of property in the plaintiffs.

As the deed of trust was recorded, the bare circumstance that the grantor in the deed remained in possession of the trust property was no evidence of fraud, the record in such cases under our statute being equivalent to a transmutation of possession.

Taking together all that the witness said in relation to the sale of the mirror, it amounted to nothing more than that there should be a sale on the payment of the purchase money. His calling the transaction a sale is to be considered with what was said afterwards. Whether the witness should have been believed is a question with which we have nothing to do.

The other judges concur. Affirmed.

Lynch v. Morrow's Adm'r.

LYNCH *et al.*, Appellants, v. MORROW'S ADMINISTRATOR, Respondent.

1. A defendant should not be permitted to introduce evidence to support a defence not set up in his answer.

Appeal from St. Louis Land Court.

Cline & Jamison, for appellants.

Barret, for respondent.

RICHARDSON, Judge, delivered the opinion of the court.

The plaintiffs brought their action against the defendant for use and occupation of a tenement belonging to them and rented to the defendant, for which they claimed three hundred dollars. The defendant, in his answer, denied that he was indebted to the plaintiffs the amount they claimed for rent or on any other account, but admitted that he owed them fifty dollars, which he offered, and was still ready and willing to pay, but they refused to accept it. The defendant on the trial was allowed to read in evidence, against the plaintiffs' objection, the following instrument, after first proving its execution: "\$100. St. Louis, January 21st, 1856. Borrowed and received from Capt. D. I. Morrow one hundred dollars, payable on demand. For Lynch, Arnot & Co., by Turnbull."

This paper was inadmissible in any light in which it may be regarded, whether as a promissory note due by the plaintiff to the defendant, or as a receipt for so much money paid by the defendant to the plaintiffs on their demand for rent. The law requires that an answer shall contain, 1st, a special denial of each material allegation in the petition controverted by the defendant, and 2d, a statement of any new matter constituting a defence or counter claim. And, therefore, if the paper was intended to be used as a set-off, it should have been set up in the answer as a counter claim. Or if it was offered to prove a payment of any part of the sum sued for,

Winkelmaier v. Weaver.

it ought to have been excluded as there was no such defence as payment made in the answer. (Winston v. Taylor, 28 Mo. 82.)

The other judges concurring, the judgment will be reversed and the cause remanded.

WINKELMAIER, Respondent, v. WEAVER, INTERPLEADER, Appellant.

1. Should the objection be taken, at the trial of an issue raised by an interplea in an attachment, that the interpleader only claims the attached property as *cestui que trust*, he should be permitted to substitute his trustee as plaintiff in the interplea.

Appeal from St. Louis Court of Common Pleas.

Garesché and Bakewell, for appellant.

I. The court should have allowed the amendment sought. The interplea was founded upon the claim made by the interpleader before the sheriff under the sheriff and marshal's act. (Sess. Acts, 1855, p. 464.) Weaver had an "interest" in the property attached. He was entitled to make claim to the property. The court erred in giving the instruction. (See 3 How. Prac. R. 322; Voorhies' Code, 193; 2 P. Wms, 758; 27 Mo. 229.)

H. N. Hart, for respondent.

NAPTON, Judge, delivered the opinion of the court.

This was a suit by attachment against Bonnet, and Weaver, interpleaded, claiming an interest in the property attached as assignee of one Umsted, who was the *cestui que trust* in a deed from Bonnet to Seay. Upon the trial, the case was disposed of by an instruction, that the claimant was not entitled to recover upon his interplea; for what reason is not stated, but it is presumed on the ground that the legal title

Hamilton v. Fulton.

was in Seay and the claim should have been in his name. An offer was then made to substitute Seay as the claimant in place of Weaver, but this was not permitted.

We do not see any good reason why this case was not tried on its merits. The claim under the deed of trust was the one asserted, and it was of no consequence to the plaintiff in the attachment suit, in whose name it was preferred. We do not mean to say that in an ordinary suit the court ought to permit one plaintiff to be substituted for another after the evidence has shown that the one suing was not entitled to recover; but this proceeding was under the local act of 1853 concerning the duties of sheriff and marshal in St. Louis county, and authorizes any one having an interest in the property to set up his claim. Weaver had an equitable interest if the deed was valid, and he was the only one who did have any real interest, as there were no other beneficiaries in the deed. But conceding that the claim should have been in the name of the trustee, as the proper mode of proceeding under the act, we think the court, under the circumstances, should have allowed the amendment. It was merely formal and could not affect the merits of the case in any way.

Judgment reversed and cause remanded. The other judges concur.

HAMILTON, Respondent, v. FULTON *et al.*, Appellants.

1. Judgment affirmed.

Appeal from St. Louis Court of Common Pleas.

Krum & Harding, for appellants.

Hitchcock, for respondent.

SCOTT, Judge, delivered the opinion of the court.

We see nothing in this record which will warrant the reversal of this judgment. There is no exception taken to the regularity of the judgment against the defendant Fulton.

Hohenthal v. Watson.

Kimbal being a part owner and present when the injury was done, it was properly left to the jury whether he was a contributor to the wrong done to the barge of the plaintiff. His presence when the first act was done which endangered the barge was a circumstance from which the jury might infer his assent to what was done afterwards, as all the subsequent acts were prompted by the motive which induced the first. At the instance of Kimbal the jury was instructed that there would be no recovery against him for any wrongful act of the defendant Fulton without his knowledge and consent. Seeing no error in the instructions which affected the defendant, and the jury having found that he participated in the wrong done to the plaintiff, the judgment will be affirmed.

The other judges concur.



HOENTHAL, Appellant, v. WATSON, Respondent.

1. A party can not assign for error that which is beneficial to himself and prejudicial to the opposite party alone.
2. Where, in an action for the possession of personal property, the plaintiff gives bond and receives possession of the property, and the cause is tried by a jury, the jury, regularly, in case of finding for the defendant, should assess the *value* of the property, as also the damages.

Appeal from St. Louis Court of Common Pleas.

The facts sufficiently appear in the opinion of the court.

Krum & Harding, for appellant.

I. The court below erred in directing the clerk to disregard the finding of damages contained in the verdict of the jury and to enter judgment for the defendant, with an order for a future assessment of damages. If a jury return an imperfect verdict, they may be directed to retire and correct it. (2 Greenl. R. 37; 1 A. K. Marsh. 67.) But where the jury themselves have erred in matter of substance, as by finding for the wrong party, or for a larger or smaller amount than was proper, and have separated, the court can

Hohenthal v. Watson.

not amend the verdict, though it may set it aside and grant a new trial. (2 Greenl. R. 37; 7 Metc. 46.) In this case the verdict was in form and needed no amendment. The jury found upon the issues which the court itself had directed them to find upon. The court having charged the jury with the assessment of damages, their verdict so affected the rights of the parties as to place it beyond the power of the court in respect to the amendment ordered.

McClellan, Moody & Hillyer, for respondent.

I. The error complained of could in nowise affect the rights of the plaintiff. The only party who had any reason to complain was the respondent. The court instructed the jury erroneously no doubt; but how could it affect the plaintiff's right? The court properly disregarded that portion of the verdict concerning the damages, and regarded it simply as a verdict for the defendant. The defendant lost his damages, and recovered only the value of the property as assessed by the court. He is the only party that suffered by the ruling of the court.

NAPTON, Judge, delivered the opinion of the court.

The proceedings in this action, which under common law forms would have been replevin, are regulated solely by the statute. Where the plaintiff is nonsuited, a writ of inquiry must issue to ascertain the value of the property, if the plaintiff has possession of it, and to assess the damages for its taking or detention. Where, however, the case is tried, the jury should regularly assess the value of the property taken in case of a finding for the defendant and where the plaintiff is in possession, and should also assess the damages. This can all be done and ought regularly to be done by the same jury. The ascertainment of the value of the property is essential, as the judgment in such cases must be against the plaintiff and his securities, that he return the property taken or pay the value so assessed and the damages and costs.

In this case, under instructions from the court, the jury

merely assessed the damages in their verdict for the defendant, but did not assess the value of the property. The court, treating the verdict as simply one for the defendant upon the main issue, and disregarding their finding of the damages, refused to set it aside on account of the failure to find the value, but let it stand as a verdict for defendant, and ordered an inquiry to ascertain the value of the property taken, which was accordingly made by the court, neither party requiring a jury.

The proceeding was not regular, but we do not perceive how the plaintiff could possibly be injured by it. The finding for damages against the plaintiff was disregarded, and in the inquiry afterwards had no damages were assessed, but the value of the property was ascertained and a judgment entered for its return or the payment of its value, without damages. The only purpose which the plaintiff could have in view by such a motion would be a new trial on the merits, and this he demands, not because any error was committed in the trial before, so far as they are concerned, either by the court or jury, but simply because the jury failed to find, as they should have done, the value of the property—a matter which could only be prejudicial to the defendant.

Judge Richardson concurring, the judgment is affirmed.

Judge SCOTT, dissenting. I know no law nor practice which warrants the trying one-half of a cause by one jury and the other half by a different jury. If the jury first sworn to try the cause failed to assess the damages, their verdict should have been set aside, and a *venire de novo* awarded. There was no authority in the court to have summoned a second jury to supply the omissions of the jury first sworn. After the court had determined that there should be a second jury, there was no waiver of the error in consenting that the assessment of damages should be made by the court.

LABARGE, Respondent, v. RENSHAW, Appellant.

1. A. and B. made an exchange of lands, each party agreeing to pay one-third of all taxes for the year assessed upon the land sold by him to the other, and two-thirds of the taxes assessed upon the land bought by him from the other. A. paid to B. the proportional share of the taxes agreed upon. B. did the same. Among the taxes assessed against the land sold by A. to B. was a railroad tax. This tax A. was by law exempted from paying by reason of his being a stockholder of a railroad company. He did not actually pay said tax, but, in his account with the collector, he was credited with the amount of the railroad tax by reason of his having previously paid his subscription of stock to an equal amount. At the time B. made his payment to A. of the agreed proportional share of the taxes, he did not know that A. was a stockholder and therefore exempt from paying the railroad tax, and that he had not actually paid it. *Held*, that B. was not entitled to recover back the two-thirds of the railroad tax paid by him to A.

Appeal from St. Louis Law Commissioner's Court.

This was an action to recover back \$102.66 alleged to have been paid by plaintiff to defendant under a mistake of fact and induced by the fraudulent representations of defendant. The cause was tried by the court without a jury upon an agreed statement of the facts. The facts thus agreed upon are substantially as follows: Labarge, the plaintiff, and Renshaw, the defendant, on the 10th of May, 1855, made an exchange of lands. By instrument under seal it was agreed between the parties that the state, county, city and railroad taxes for the year 1855 should be apportioned between the parties as follows: "The said Renshaw shall pay one-third, and the said Labarge two-thirds, of the whole amount" of taxes assessed upon the land conveyed by Renshaw to Labarge. In like manner, it was agreed that Labarge should pay one-third, and Renshaw two-thirds of the whole amount of taxes, city, state, county and railroad, assessed upon the land conveyed by Labarge to Renshaw. The whole amount of taxes assessed upon the land conveyed by Renshaw to Labarge was \$363. This sum included \$154 railroad tax. Renshaw, being one of the original stockholders of the Pacific Railroad and having paid up his subscription of stock, was

Labarge v. Renshaw.

exempted by law from paying the said railroad tax of \$154. He did not in fact pay said railroad tax of \$154 or any part thereof. In his account with the tax collector, he was, however, credited with the payment of said tax, he not yet having had credit for the full amount subscribed by him. Labarge paid to Renshaw the agreed proportional share of the taxes, including two-thirds of said railroad tax of \$154. Labarge did not know at the time of making this payment that Renshaw was a stockholder and had not actually paid the railroad tax. Renshaw, in compliance with the agreement above stated, paid to Labarge the agreed proportional share of the taxes—one-third of the taxes assessed upon the land sold by him to Labarge, and two-thirds of the taxes assessed upon that bought by him from Labarge. This action is brought to recover the sum of \$102.66—two-thirds of said railroad tax of \$154. The court found for the plaintiff.

Biddlecome, for appellant.

I. The plaintiff only complied with his agreement in paying two-thirds of the railroad tax. Renshaw, by owning stock, was in the position of one who had prepaid or advanced the tax. The appellant was liable for the taxes when the exchange of land was made. If he had not been a stockholder, he would have been entitled to the stock certificate under the provisions of the law. (Sess. Acts, 1853, p. 136, § 31.)

Whittelsey, for respondent.

I. The defendant did not actually pay the railroad tax, and therefore could not demand of plaintiff the two-thirds thereof. If the tax had been actually paid, the plaintiff would have been entitled to a certificate, which would have given him the amount he paid in stock of the company; but the defendant deprives him of this, keeps his own stock, and obtains \$102.66 from the plaintiff without any consideration whatever.

SCOTT, Judge, delivered the opinion of the court.

We do not see on what ground the plaintiff can maintain this action. Suppose he recovers; on what principle will he be discharged from his contract with the defendant to pay the tax, the subject of this suit? If the defendant had refunded the money in controversy, would he not have had an immediate right to recover it on the contract by which the plaintiff bound himself to pay it? And if the plaintiff recovers in this suit, will not that right revive? If the defendant has injured or defrauded the plaintiff, let him sue and recover his damages. The only injury the plaintiff could have sustained, if any, was the loss of the stock to which the payment of the railroad tax would have entitled him. All that he could recover would be the value of that stock. But was the plaintiff entitled to any stock for the railroad tax paid on the Morrison property? That property was assessed as the defendant's; he was liable for the railroad tax by reason of his contract and title thereto, and he was the person entitled to the railroad tax upon the payment of the tax. Now if he has procured another to pay the tax, will not such payment, under the thirty-first section of the act entitled "An act to authorize the formation of railroad associations and to regulate the same," approved February 24, 1853, (Sess. Acts, 1853, p. 121,) enure to his benefit? If the plaintiff's action was for fraud or misrepresentation or mistake only, without regard to the contract between the parties relative to the payment of the taxes, then, if he recovered the sum paid, he would still be bound under his contract to repay the same. The plaintiff's situation would not be bettered by succeeding in this suit. We do not see what difference it makes in the case, that the law furnished the defendant with an easy way of paying the tax—if it may be called easy, when he had advanced every cent of the money for the stock which he received, That was his good fortune. It placed the plaintiff in no worse situation. It created no loss to him, and he has no cause to complain, as under the section of the act referred to

State, to use of Bank of Missouri, v. Hawkins.

he could not have gone into the market and purchased stock with which he might pay his tax. Only such stock was available for that purpose as was in good faith subscribed by the tax payer using it. It does not appear that the plaintiff was a stockholder by a *bona fide* subscription; he then could only have paid this tax in money. The defendant has paid it for him. He has repaid the defendant, and now would recover it from him in order that he might by another suit be made to pay it again.

The other judges concurring, the judgment is reversed.

THE STATE, TO USE OF BANK OF MISSOURI, Plaintiff in Error,
v. HAWKINS *et al.*, Defendants in Error.

1. A. was appointed attorney for a bank for a term of two years. His compensation as such attorney was three per cent. upon all collections made by him in the county in which the bank was located, and five per cent. upon all collections made out of said county. During his term of office, he obtained judgment in favor of the bank upon a claim deposited in his hand for collection. *Held*, that he was entitled to his three per cent. commission on the amount recovered, whether he received the money on the judgment during his term of office or not.
2. An attorney of record in a cause is authorized to receive payment of a judgment recovered therein. Those dealing with such an attorney will not be affected by any arrangements entered into by him with his client, or by a revocation of his authority of which they have no notice.

Error to Marion Circuit Court.

This was an action against Benjamin M. Hawkins and his sureties on his official bond. The breach assigned was the making of a false return of a writ of execution. The cause was tried by the court without a jury. The facts as they appeared in evidence are substantially as follows: On the 3d of February, 1855, by a resolution of the board of directors of the Branch of the Bank of the State of Missouri at Palmyra, Thomas L. Anderson was declared duly elected attorney for the bank "for two years next ensuing." Ander-

son was to receive the same compensation as that paid to his predecessors in office—three per cent. on all collections made in the county of Marion and five per cent. on all collections made out of said county. During his term of office, he instituted suit in favor of the bank upon a bill of exchange deposited in his hands for collection. On the 4th of December he recovered judgment in this suit against the defendants therein, William Shoot and others. On the 31st of January, 1856, the board of directors of the bank elected John D. S. Dryden attorney of the bank in the place of said Anderson. On the 20th of April, 1857, the board of directors passed the following resolution: "*Resolved*, that Thomas L. Anderson, Esq., the late attorney of the Branch of the Bank of the State of Missouri at Palmyra, be, and he is hereby, requested and directed to surrender to John D. S. Dryden, the present attorney, the charge, conduct and management of all suits, judgments and executions now pending for debts due this Branch, and to deliver to said Dryden all notes, bills and evidences of debt due this Branch in his (said Anderson's) possession." A copy of this resolution was furnished to Anderson on the 23d or 24th of April. On the 29th of April, 1857, Anderson received from Shoot, one of the defendants in said suit, the amount of said judgment. On the same day he tendered said sum so received, less three per cent. thereof, to the cashier of the bank. The cashier refused to receive any thing less than the whole amount of the judgment on the ground that Anderson was not attorney of the bank and hence not entitled to charge commissions. Previous to the payment of the amount of the judgment to Anderson, and early in April, said Shoot had, in an interview with the cashier of the bank, stated that "he wanted no execution issued" on the judgment in the above mentioned suit. The cashier, in reply, stated that the matter was beyond his control, and referred him to the attorney of the bank, Mr. Dryden, as having the matter in his charge. On the 12th of May, 1857, Mr. Dryden, as attorney for the bank, procured the issuing of an execution on said judgment

State, to use of Bank of Missouri, v. Hawkins.

against Shoot and others. On this execution, Mr. Dryden's name was endorsed as attorney for the bank. On this execution, on the 29th of May, 1857, Mr. Anderson made the following endorsement: "The debt and interest on the within execution has been paid to me in full, and the sheriff will return this execution satisfied. May 29, 1857. Thomas L. Anderson, attorney for plaintiff." In obedience to this direction, the sheriff did, on the first day of June, 1857, return said execution "satisfied, by order of plaintiff's attorney." Whereupon the present suit was instituted against the sheriff and his sureties on his official bond for making a false return.

The court gave the following instructions at the instance of the defendants: "1. If the debt against Shoot and others was placed by plaintiff in the hands of Thomas L. Anderson, as attorney at law, for collection, under an agreement that said Anderson should have for his services in collecting said claim three per cent. on the amount collected, and that under said agreement said Anderson instituted suit against said Shoot and others and obtained judgment, and that before the execution issued said Shoot paid to said Anderson the full amount of said debt, and that said Anderson tendered the full amount so collected to plaintiff less three per cent. for his services, and that the sheriff was notified of the above facts by said Anderson and directed by said Anderson to return said execution satisfied, then the plaintiff can not maintain this action and the verdict should be for defendants. 2. If Thomas L. Anderson was the attorney of record, a payment to him by the defendants in the execution of the amount due is a discharge of the judgment by the law of Missouri, and it was his duty to stop the execution, and the sheriff was bound to obey his order."

The plaintiff asked the court to give the following instructions or declarations of law: "1. If it appear from the evidence that Thomas L. Anderson, Esq., was appointed by the relator her attorney on the 3d of February, 1855, to hold for the term of two years next thereafter, and that his said term

State, to use of Bank of Missouri, v. Hawkins.

of two years had elapsed and expired before the receipt by said Anderson of said sum of \$886.75 from Shoot and others, defendants in the judgment of the Hannibal court of common pleas, then the receipt of said sum by said Anderson was not a payment to or binding upon the relator, nor a discharge or satisfaction of the judgment of the bank against Shoot and others or any part thereof, and the court ought to find a verdict for the plaintiff. 2. Unless it appears from the evidence in the cause that at the time Thomas L. Anderson, Esq., received the said sum of \$886.75 from said Shoot and Westfall, he was the attorney of the said relator, his receipt of the same was not binding on the relator, nor did it discharge the said judgment in favor of the relator against said Shoot and others, and the court should find a verdict for the plaintiff. 3. If it appear from the evidence in the cause that prior to the receipt of the said \$886.75 by Thomas L. Anderson, Esq., from Shoot and Westfall, the relator had dissolved the relation of attorney and client between him and her, and revoked his (said Anderson's) authority to receive and collect the money due and owing on said judgment of the Hannibal court of common pleas, then the receipt of said sum of money by said Anderson was not binding upon the relator, nor did it discharge said judgment or any part thereof. 4. Although it may appear from the evidence in the cause that Thomas L. Anderson, Esq., was the attorney of the relator, the bank, in the recovery of the judgment in the common pleas against Shoot and others, yet if it further appear from the evidence that, prior to the receipt of said sum of \$886.75 by said Anderson from the defendants in said judgment, the relator had dissolved the relation of attorney and client between him and her, and revoked his (said Anderson's) authority to receive and collect the money due and owing on said judgment, and that the defendants in said judgment, prior to the receipt of said sum by said Anderson, had notice of the said revocation of said Anderson's authority, then the receipt of said sum of money by said Anderson was not binding upon the relator, nor did it discharge or

State, to use of Bank of Missouri, v. Hawkins.

satisfy the said judgment or any part thereof. 5. If it appear from the evidence in the cause that said Thomas L. Anderson, Esq., was appointed by the relator on the 3d of February, 1855, her attorney to hold for the term of two years next thereafter, and that his term of two years had expired before his receipt of said sum of \$886.75 from Shoot and others, defendants in the judgment of the Hannibal court of common pleas, and that said Shoot and others, at the time or prior to the payment of the said sum to said Anderson, had notice that his said term had expired, and that he had no authority to receive for the relator, then the payment of said sum to said Anderson was not a payment to or binding on the relator, nor did it discharge the said judgment or any part thereof." Of these instructions the court gave that numbered two and refused the others. The court found for the defendants.

Dryden and H. M. Jones, for plaintiff in error.

I. Anderson's relation to the bank was that of an attorney only. Whenever he ceased to be attorney at law for the bank, all authority to act for it in any capacity ceased. The bank might at any time revoke his authority, even during the term for which he was originally appointed. The length of the term the bank determined. Whenever a revocation was made, all authority ceased. His authority was by its very nature revocable. Anderson's authority ceased with the expiration of his term of office. He was superseded by the new appointee. No further revocation was needed. We have, however, a formal resolution of the board of directors as explicit as possible. After this revocation, he had no authority whatever to act for the bank. He could not control suits of the bank, whether they had ripened into judgments or not. He ceased to be attorney for the bank. All agency whatever ceased. He was not authorized to receive payment of the judgment. Payment to him was not payment or extinguishment of the judgment. He was not authorized to control the execution in any way. He could not lawfully

State, to use of Bank of Missouri, v. Hawkins.

order the clerk to issue it. He could not interfere to in any way control or direct the sheriff in the execution or return of the writ. The question whether Anderson was or was not entitled to his three per cent. upon the amount recovered is not involved in this case. Let it be granted that he was so entitled, that was a matter between him and the bank with respect to services already rendered. The question at issue is one of agency, of authority to represent the bank after it had done all it could to revoke the authority. All the parties, both the defendants in the judgment and the sheriff, knew that Anderson's authority had been revoked and that Dryden was the attorney of the bank. The court below decided the cause upon the ground that the bank could not revoke. It ignored all questions of notice of revocation.

Anderson, for defendants in error.

I. Anderson as attorney was authorized to receive the amount of the judgment. Whether he was or not, the sheriff was justified in obeying his directions. He was the attorney of record. The sheriff had no notice given him that Anderson, the attorney of record, had been superseded by any other attorney. (See *Langdon v. Potter*, 13 Mass. 363; 1 Dana, 425.) Anderson had a lien on the amount collected for his fee. He was entitled to deduct his fee. (Wright, 485; 11 N. H. 163; 15 Verm. 544.)

SCOTT, Judge, delivered the opinion of the court.

Under the contract with the bank for the collection of her debts, we are of the opinion that Anderson was entitled to his commission for collecting the judgment in the suit which has given rise to this controversy. As he had performed all that was necessary to receive the money, he was, under the contract, entitled to his fee, and the bank could not, by refusing to reappoint him to the office he held, deprive him of it. Anderson held a double relation to the bank—one growing out of his appointment as her attorney, and the other arising from the contract in relation to the collection of her

State, to use of Bank of Missouri, v. Hawkins.

debts. The termination of one of these relations did not necessarily destroy the other. There need have been no misunderstanding on this subject, as the bank could have made her contracts in such way as to avoid all controversy. The interpretation we give the contract subjects the bank only to the payment of one commission, and, as between Anderson and his successor, justice would award it to Anderson.

But this suit is not against Anderson, but against the sheriff, who, by Anderson's order as attorney for the bank, returned the execution satisfied. The bank maintains that this return is false, that Anderson was not her attorney, and that he had no right to receive the money. Anderson, after receiving the money, tendered to the bank the amount less his commission, but she refused to take it, insisting on her right to the whole without any deduction by way of fee or commission. Anderson was the attorney for the bank, appointed for two years by a resolution of the board of directors, and obtained the judgment, on which the execution was issued, before his term expired, but did not receive the money until he was replaced by another in his office. He was the attorney of record for the bank in the suit in which the execution issued. So he was a general attorney for the bank and he was the attorney of record in the suit in which he received the money.

The attorney of record is authorized to receive the money collected on a judgment recovered by him for his client. Those dealing with such an attorney can not be affected by any private arrangements between the attorney and client by which the extent or duration of the power of the former may be limited. The books say that an attorney of record can not be changed but by an order of court. There is some policy in this rule, as by our statutes the attorney of record in some cases is made the person to receive notices. If a change of attorney can be made secretly without any notice, a door would be opened for collusion by which these statutes would be evaded and suitors might be entrapped.

There is nothing which prohibits a client from authorizing

Shephard v. St. Charles Western Plank Road Co.

as many persons as he pleases to receive his money, and if they do receive it, so far as he is concerned, he will be bound by their act. But if there is an attorney of record, the authorizing of another by a client to receive the money on an execution does not divest an attorney of record of his authority. The client may authorize as many as he pleases to act for him without intending to revoke any authority he has previously bestowed. So equivocal an act as an authorization to another to receive money would not be notice that the attorney of record was displaced. Had the defendant known that Dryden was the attorney of the bank at the time he paid the money to Anderson, that would have been no notice that the authority of Anderson, as attorney of record had been revoked. No opinion is given on the question whether an attorney of record can be changed otherwise than by leave of the court. In my opinion, there is no evidence here that Anderson's authority as attorney of record had been recalled such as should affect any one dealing with him in that character.

NAPTON, Judge, concurs in affirming the judgment.

SHEPHARD *et al.*, Plaintiffs in Error, v. ST. CHARLES WESTERN
PLANK ROAD COMPANY, Defendants in Error.

1. Certain contractors agreed with a plank road company "to do the necessary masonry, grading, gutters and all things else pertaining to the complete graduation and masonry" of a division of the plank road. The company agreed to pay "at the rate of sixteen cents per cubic yard for all *excavation of earth* done on said road under this contract." Unexpectedly to both contracting parties, the contractors, in fulfilling their contract, met with a large amount of indurated earth and cemented gravel, which they excavated. *Held*—it appearing that among engineers and contractors indurated earth and cemented gravel were known and recognized as entirely distinct from common earth, and that it was customary for contractors to receive extra compensation for excavating such materials—that the price to be paid the contractors for the excavation of such materials was not provided in the contract, and that consequently they might recover what the same was reasonably worth.

Shephard v. St. Charles Western Plank Road Co.

Error to St. Louis Circuit Court.

William Shephard and Thomas Spence contracted with the St. Charles Western Plank Road Company "to do the necessary masonry, grading, gutters and all things else pertaining to the complete graduation and masonry of the *first division* of the St. Charles Western Plank Road." It was further stipulated that the company would pay the contractors "at the rate of sixteen cents per cubic yard for all excavation of earth done on said road under this contract; two dollars and sixty cents per perch of twenty-five cubic feet for masonry laid in approved lime mortar, and two dollars and thirty cents per perch as aforesaid for dry masonry." It was further agreed that all estimates made and certified by the engineer should be "conclusive and final, without the right of either party to appeal therefrom under any pretext whatever." In the "specification" accompanying the contract it was stipulated that "the trees shall be cut down and cleared off in all cases to a width not less than thirty feet on each side of the centre line of the road."

This suit was brought to recover extra compensation for the excavation of indurated earth and cemented gravel, and for grubbing and clearing the roadway of trees, and for a small amount due on contract according to the estimates made. The court, at the request of defendant, instructed the jury as follows: "1. The contract with the specifications given in evidence in this case requires the plaintiffs to do all the work necessary for the grading of defendant's road, and plaintiffs are not entitled to recover any thing for excavating the indurated or cemented earth or gravel, or for clearing of grubbing the tract of said road, beyond the price stipulated in the contract." The jury found for plaintiffs in the sum of \$158.72, an amount due to plaintiffs under contract as interpreted by the court. The character of the testimony introduced sufficiently appears below in the opinion of the supreme court.

N. D. & G. P. Strong, for plaintiffs in error.

Shephard v. St. Charles Western Plank Road Co.

I. The plaintiffs were entitled to extra compensation for excavating the indurated earth and cemented gravel. The price of this work was not fixed by the contract. The court should have granted a new trial on the ground of newly discovered evidence. (*Bubois v. Delaware & Hudson Canal Co.* 12 Wend. 334; 15 Wend. 87; 6 Greenl. 479; 2 Wash. C. C. 411.)

Coalter and Lewis, for defendant in error.

I. The work for which extra compensation is claimed by plaintiffs was embraced within the terms of the contract, and plaintiffs were entitled to nothing beyond the compensation provided therein. (See *Boyle v. Agawam Canal Co.* 22 Pick. 381.) The engineer's estimates were conclusive. (11 Gratt. 676; 7 M. & W. 313; *Russell on Arbitr.* 104; 9 Gill. 288; 16 Penn. 469; 27 Engl. L. & Eq. R. 35.) The plaintiffs recovered all they were entitled to. The instructions asked were properly refused. (21 Mo. 404.) The application for a new trial was properly refused. (1 Gra. & Wat. on New Trial, 473; 3 Id. 1046, 1067; 22 Mo. 563; *Chitt. on Contr.* 541.)

SCOTT, Judge, delivered the opinion of the court.

There is no doubt that by the terms of the contract the plaintiffs were bound to make all the excavations necessary to grade the road, of whatever materials they were composed; and, had they agreed to make the excavations at a certain price, they would have been bound to do it, notwithstanding the material of the excavation was different from what it was supposed and the removal of it was attended with a greatly increased cost. This is the principle of the case of *Boyle v. Agawam Canal Co.* 22 Pick. 381, relied on by the defendant, and in which we entirely concur. This is a familiar principle and applicable to all contracts of the kind.

But the question in this case is, not what work the contract contemplated was to be performed, but what was the price to be paid for it. It is scarcely necessary to observe

that the terms of a written contract can not be varied or added to by parol evidence. But this principle does not prevent the showing that a contingency has arisen not provided for in the contract. The evidence of the engineer satisfies us of the correctness of the view we take of this contract. He says it was supposed that the excavations would consist of ordinary earth; that among engineers and contractors there was a marked distinction between common earth and indurated or cemented earth and gravel; and that earth excavation would not be held to include cemented gravel; that it was worth more to excavate the latter than the former.

By the contract, sixteen cents for the cubic yard was the price agreed upon for earth excavations. It is clear from the evidence that this was the usual price of excavating ordinary earth, for all the witnesses testify that the excavating of indurated earth or gravel was worth a sum greatly exceeding the cost of excavating ordinary earth. It would thus appear that the defendants did not make a contract involving any hazard. They did not for a given sum undertake to do the excavation, assuming the risk of the material of which it was composed, for the price fixed was such a one as was usually paid for removing ordinary earth. The contract then only fixed a price for excavating ordinary earth. As it was supposed that there would be nothing but ordinary earth to remove, the contract only provided a price for such excavations, leaving excavations of a more costly material unfixed as to price, as it was not supposed that there would be any such to be made. This view of the subject is fully shown by the evidence of the engineer of the company, who surveyed the road in company with one of the plaintiffs, and who we must suppose disclosed all his knowledge to those who employed him.

Although by the terms of the contract the defendants were bound to make all the excavations necessary for grading the road, of whatever material they were composed, yet it does not follow that the price for removing one kind of material was that agreed upon for every kind. The obvious and

Shephard v. St. Charles Western Plank Road Co.

most natural sense of the words "excavation of earth," is the ordinary earth; for, if it was intended by the word "earth" to include all materials whatever found beneath the surface of the ground, there would have been no necessity for any specification of the material, for the word "excavation," without any other limiting its signification, would have been most appropriate to express the minds of the parties. The expression of one thing is the exclusion of another. As among contractors and engineers the terms "excavation of rock," "excavation of indurated earth or gravel" and "the excavation of earth," meaning ordinary earth, were known, signifying different kinds of work varying greatly in cost, can any thing be plainer than that the use of one of these terms is an exclusion of the other? The law appropriates no such signification to the terms "excavation of earth," nor are they technical words whose sense may not be controlled by extrinsic evidence when they are used in connection with any particular trade or business. So the ordinary and customary sense of the terms of the contract are against the defendants.

If no price was fixed for the excavation of the indurated gravel, then it was not within the contract, and the engineer had no authority to make an estimate of it. The defendant would be entitled to recover what it was reasonably worth. The engineer allowed extra compensation for excavating a portion of the indurated gravel because he thought it was right. If it was right to pay for a part, why was it not right to pay for the whole? If the estimate of the engineer was conclusive, as was contended for the defendant, we do not see on what ground the plaintiffs did not recover the amount of it, if it was right in part. From the evidence of the engineer it appears that he was of the opinion that it would be right to pay the plaintiffs an extra compensation for excavating the indurated gravel.

We are of the opinion that the clearing of the road-bed admits of different considerations from those arising out of the excavating the indurated gravel. The trees standing in

Carson v. Ely.

the road were visible and it was known that they must be removed. The specifications forming a part of the contract provided that the trees should be removed, and the excavation of the earth could not be done without first taking them away.

The other judges concur. Reversed and remanded.

CARSON, Respondent, v. ELY, Appellant.

1. Judgment affirmed.

Appeal from St. Louis Court of Common Pleas.

This case has heretofore been before the supreme court. The decision of the supreme court therein is reported in 23 Mo. 265.

Krum & Harding, for appellant.

Gantt, for respondent.

NAPTON, Judge, delivered the opinion of the court.

It seems that the contract in this case was made with Carson as agent of the St. Louis and Chicago Transportation Line, and the goods were to be forwarded without St. Louis charges. Carson, however, was not only the agent of the transportation company, but was doing business as a general commission and forwarding merchant. When the goods reached here from New Orleans, their condition was such as not to admit of being forwarded under the contract. It was necessary, at least so far as a portion of them was concerned, that they should be landed here and the casks undergo some repairs. This was done by Carson and the goods were subsequently forwarded, and this suit was to recover the expenses incurred in cooperage, &c., and for the usual commissions. The jury have found that Carson, as agent for the transportation line, refused to receive and forward the goods;

St. Louis, Alton & Chicago Railroad Co. v. Castello.

that he was justified in so doing by reason of their condition, which rendered it impossible to send them on directly under the contract; that he received the goods and incurred the charges for putting them in order as the general consignee, and that the charges, expenses, &c., were reasonable. Under these circumstances we do not feel warranted in disturbing the verdict and judgment. The case seems to have been tried upon the principles laid down by this court when it was here before, and we shall affirm the judgment.



THE ST. LOUIS, ALTON AND CHICAGO RAILROAD COMPANY, Defendant in Error, v. CASTELLO, Plaintiff in Error.

1. Where a sheriff in St. Louis county levies an execution upon personal property, a third person claiming the same may maintain an action against the sheriff for its possession without making claim thereto in accordance with the third section of the local act of March 3, 1855. (Sess. Acts, 1855, p. 464.)
2. A sheriff, under an execution against A., levied upon a lot of gold and silver and copper coins and paper currency belonging to B.; B., with a view to facilitate the institution of a suit by himself to test his title, substituted, in the hands of the sheriff, for the property levied on, bank bills of large denomination, the exchange being made by him and the sheriff under the understanding that suit would be brought by B. for the possession of the bank bills thus substituted. *Held*, that B. might, under such circumstances, maintain an action against the sheriff for the possession of the bank bills.

Error to St. Louis Court of Common Pleas.

This was an action against James Castello, sheriff of St. Louis county, to recover possession of six bank bills—five bills of the denomination of one hundred dollars, and one bill of the denomination of fifty dollars, all bills of the Bank of the State of Missouri. The facts as they appeared in evidence at the trial are substantially as follows: Under an execution in favor of one Joseph Farrell and against the Chicago and Mississippi Railroad Company, Castello, the defendant in the present suit, as sheriff, levied on a lot of gold,

St. Louis, Alton & Chicago Railroad Co. v. Castello.

silver and copper coins and paper currency. The moneys thus levied on did not belong to the defendant in the execution but to the St. Louis, Alton and Chicago Railroad Company. There was evidence tending to show that, while the moneys thus levied on were in the hands of the sheriff, the St. Louis, Alton and Chicago Railroad Company substituted therefor the bank bills sued for in the present action; that this substitution and exchange were made to facilitate the institution of a suit by said company in assertion of its title, and under an understanding that the property thus substituted should be considered the property levied on instead of that first taken. Among other instructions which the court gave was the following: "3. If the court believe from the evidence that the bank bills mentioned in the plaintiff's petition were the property of plaintiff, and were substituted for the property first levied on by the defendant, which was also claimed to be the property of the plaintiff, by agreement between plaintiff and defendant, for convenience in bringing a suit for the delivery of the same, with the understanding that it should be considered the property levied on instead of that first taken, and that it was so exchanged with notice that it was not the money of the defendant in the execution, and that it would be taken out of the defendant's hands, by an order of the court, in a suit for the claim and delivery of property, then such exchange is not a voluntary payment to the sheriff, and the plaintiff is entitled to recover in this action."

The court found for the plaintiff.

H. N. Hart, for plaintiff in error.

I. The money first levied on was never claimed by plaintiff. We have no facts to establish that it ever did belong to it. The five one hundred dollar bills and the one fifty dollar bill did belong to the company, yet, as they voluntarily exchanged them with the plaintiff for different property, which was levied on, and as no levy was made on said bills, the defendant was entitled to a judgment, and the court improperly gave the instructions for the plaintiff.

Ames v. Orme.

G. P. Strong, for defendant in error.

I. It was not necessary to make claim to the property according to the provisions of the third section of the local act of March 3, 1855. (*Bradley v. Holloway*, 28 Mo. 150.) There is no ground for contending that the bills sued for were paid on the execution as a voluntary payment. The understanding under which the substitution was made was fairly submitted to the jury.

NAPTON, Judge, delivered the opinion of the court.

The liability of the sheriff to an action of replevin, under the circumstances of this case, is settled in the case of *Bradley v. Holloway*, 28 Mo. 150.

The exchange of bank notes for the convenience of bringing suit could not, of course, be regarded as a voluntary payment to the sheriff, or a waiver of claim on the part of the railroad company, and the understanding of the parties to it at the time of its occurrence having been submitted as a fact to be passed upon under proper instructions, there is no ground for disturbing the verdict and judgment. The other judges concurring, the judgment of the court is affirmed.

AMES, Respondent, v. ORME, Appellant.

1. Judgment affirmed.

Appeal from St. Louis Law Commissioner's Court.

Goodlett, for appellant.

A. M. & S. H. Gardner, for respondent.

NAPTON, Judge, delivered the opinion of the court.

This case was tried under instructions to which each party assented, and upon testimony which was admitted without objection from either side. The dispute involved really no

Moies v. Eddy.

legal questions; but were questions of fact suitable for a jury, and as the jury have passed upon them, and the court has sanctioned their verdict, there is no ground for the interference of this court. Judgment affirmed.

MOIES *et al.*, Respondents, v. EDDY, Appellant.

1. It is the province of the jury to determine questions of fact at issue in a cause; the court should not direct them to draw inferences that are not legal inferences.

Appeal from St. Louis Court of Common Pleas.

This was a suit against the defendant as endorser of a promissory note. The defence relied on was that the consideration for said note had failed, or that, by the wrongful taking of certain personal property, which had been conveyed to defendant's trustee to secure defendant against his liability on account of his endorsement, the plaintiffs became liable to him to an amount exceeding the amount of the note. It is deemed unnecessary to set forth the facts more fully.

Krum & Harding, for appellant.

Hitchcock, for respondents.

NAPTON, Judge, delivered the opinion of the court.

The latter part of the second instruction given for the plaintiff in this case was erroneous. The jury were directed to infer an intention on the part of Eddy to relinquish his security from his knowledge of the fact that the burr mills were returned when he endorsed the note sued on and his failure to make any objection. Such an inference is not a legal one, nor, as a matter of fact, does it necessarily follow. When the defendant took his deed of trust upon the Harrison burr mills and other machinery, he was apprized of the understanding that the mills were to be exchanged for others

if they did not suit, and his failure to object to their removal may very well have arisen from a belief that the substituted mills would be covered by the deed of trust. Whether such an opinion would have been well founded or not in law is not material, but, if entertained in fact, it would rebut any conclusion that it was his intention, when he assented to the removal of the Harrison burr mills, to relinquish his security. It is stated in the bill of exceptions that the defendant also knew that these Harrison burr mills were credited by the plaintiff on Smead's general account—a circumstance, which, if true, would certainly be very strong evidence to show an intention on the defendant's part to relinquish his lien. But that point was not submitted to the jury by the instruction. Whether the defendant intended to give up his lien on the mills was a question of fact to be left to the jury upon all the circumstances in evidence, and his intention is not an inference in law to be drawn by the court from the single circumstance of his silence when the mills were returned with his knowledge. Judgment reversed and cause remanded; the other judges concur.



McKEE, Plaintiff in Error, v. THE PHOENIX INSURANCE COMPANY, Defendant in Error.

1. Should an insurance company wrongfully refuse to receive premiums due on a life policy, the assured may treat the policy at an end, and may recover back all the premiums paid under it.
2. Where the life of a husband is insured for the benefit of the wife, the policy is not necessarily determined by the wife's obtaining a divorce from the husband; she may still have, it seems, an insurable interest in the life of the divorced husband that will support the policy.

Error to St. Louis Court of Common Pleas.

Demurrer to a petition. The petition is as follows: "Plaintiff states that the defendant is indebted to her in the sum of \$548 for money had and received to and for the use of said plaintiff, as by the following account will appear;

McKee v. Phoenix Insurance Co.

[here follows an account of cash payments commencing May 12, 1849, and ending November 12, 1855, amounting to \$548 ;] all of which will also appear by reference to the endorsements on a certain policy of insurance which will be herewith filed. Also in the sum of \$1,452 for damages on account of a breach of contract by the said defendant, the particulars of which are as follows : On the 12th day of May, 1849, plaintiff was the wife of Hiram McKee, by whom she had four children, then and now living. She determined, with her own means procured by her own labor and economy, to avail herself of the benefits held out by the defendant, and insured the life of her husband. A contract was made with said defendant to that effect on the terms and conditions contained in the policy aforesaid. Afterwards her husband went to California, whereby she was required by said defendant to pay an additional sum of fifty dollars, which she paid as shown by exhibit B., which will be herewith filed, and which is included in the foregoing account. Afterwards, on account of her husband remaining in California and abandoning her, she applied for and obtained a divorce, to-wit, in the month of October, 1854, and after said time continued to pay the semi-annual instalments required by said policy, which the defendant continued to receive till the 12th day of May, 1856, at which time plaintiff offered to pay said instalment then due, being thirty-five dollars and fifty cents, and tendered the same within the time required by said policy, which they refused to receive ; and have thereby in other respects broken their aforesaid contract with the plaintiff. Whereby the plaintiff is entitled to recover said damages so as aforesaid claimed. Plaintiff prays judgment for said sum of \$548 and interest, and for said damages of \$1,452."

By the policy of insurance filed with the petition the Phoenix Insurance Company assured "the life of Hiram McKee, of the city of St. Louis, in the county of St. Louis, state of Missouri, for the sole use of the said Nancy Pettit McKee, in the amount of two thousand dollars, for the term of his natural life."

The defendant demurred to this petition on the ground, first, that when the plaintiff was divorced from her husband, she had no further interest in his life, and could not recover on the policy in the event of his death, and second, that the payments mentioned in the petition were voluntarily made.

The court sustained this demurrer.

Morehead, for plaintiff in error.

I. Plaintiff had an insurable interest. She is a creditor. She has children. She supports them. The husband is liable for that support. He is liable for the costs of the divorce. The children also have an interest in his life, and this policy was for the benefit of wife and children. The receipt of premiums after the divorce was a waiver, and a sanction of the fact that she had an interest, even if the divorce rendered the policy void for want of interest. If it should be said they had no knowledge of the divorce, we answer, that was a matter of proof. The policy did not provide for a forfeiture in case of a divorce. The policy was good and valid. The defendant having refused to receive premiums and having committed a breach of the policy, the plaintiff may recover back the premiums paid.

S. T. & A. D. Glover, for defendant in error.

I. There is no breach alleged of any contract set forth in the petition. That defendant would not receive the premiums is no breach. While the life of the husband continues no action lies on the policy. The husband is not shown to be dead. When the wife was divorced from her husband, her interest in the subject insured ceased. The policy became null, and all payments made became forfeit to the insurers. (Ang. on Life Ins. 296, 323.) The demurrer was properly sustained.

SCOTT, Judge, delivered the opinion of the court.

On what ground did the company claim to hold the premiums paid after the divorce, even admitting that the divorce

determines the contract? Will they pretend to hold them on the ground that they were ignorant of the fact that a divorce had been obtained? If they were ignorant of the fact, would that entitle them against all conscience to retain this unfortunate woman's money? The clause in the contract, that "in every case where this policy shall cease or become null or void, all previous payments made thereon shall be forfeited to the said company," had nothing to do with these payments; nor do we presume it will have any application where the policy ceases by the wrongful act of the company.

If the defendant (the company) wrongfully determined the contract by refusing to receive a premium when it was due, then the plaintiff had a right to treat the policy as at an end and to recover all the money she had paid under it.

We will not undertake to say, from the pleadings in the cause, as they appear to us, that the wife, by suing for and obtaining a divorce from her husband, ceased to have such an interest in his life as would render an assurance of it by her illegal. There seems to be a difference of opinion among jurists as to the legality of life insurances, where the party insuring has no interest whatever depending on the life of the person insured. (Philips on Ins. p. 131; Angel on Fire and Life Insurance, 307.) There is nothing in the contract as stated in the petition, which shows it to be a wagering one or in anywise contrary to public policy. We see no danger to the interests of the community in sanctioning this policy. Why should not a mother, who has four children by a man from whom she has been divorced, be permitted to insure the life of that father to whom her children may look for support? If the care and custody of the children have by the decree of a divorce been entrusted to the mother, that will not extinguish the obligation of the father to provide for them. It is nevertheless his duty, though divorced and the care of the children taken from him, to support them. That natural obligation, by his own act, can not be impaired or destroyed.

St. John's Adm'r v. McConnell.

There may be a provision decreed the wife for her support to be paid by the husband. This would in effect make her the creditor of her husband, and, being so, she would, without controversy, have a right to insure his life.

The question of the measure of damages for a breach of the contract to insure the life of the husband, he being still alive, has not been argued and we express no opinion in relation to it. Certainly the mere return of the premiums with interest would not be the standard in all cases. In many it would be very unjust, especially after the policy had continued for years and the period of existence had consequently been shortened. If the person whose life is insured, though alive, should be laboring under a disease that must speedily result in his dissolution, the insurer would not be permitted to escape the payment of the amount for which the life was assured, by putting an end to the contract of insurance. Reversed and remanded; Judge Napton concurring. Judge Richardson not sitting.



ST. JOHN'S ADMINISTRATOR, Defendant in Error, v. MCCONNELL, Plaintiff in Error.

1. Judgment affirmed.

Error to St. Louis Court of Common Pleas.

Krum & Harding, for plaintiff in error.

Polk, for defendant in error.

SCOTT, Judge, delivered the opinion of the court.

The instructions given in this case were favorable to the defendant, and no exceptions were taken to them by him. There was no evidence admitted against the defendant or for the plaintiff on which any point was made in this court. The evidence was sufficient to warrant the verdict without that

Ham v. Barret.

given in rebuttal by Bullock showing that Charles Collins was a secret partner of the firm of McConnell & Co. The affidavits filed in support of the motion for a new trial on the ground of surprise, did not make out a case for that purpose. The verdict upon the entire record is entirely satisfactory, and should not in our opinion be set aside. The other judges concurring, the judgment will be affirmed.

HAM, Respondent, v. BARRET, Appellant.

1. Where a presumption is one of fact merely, a court is not warranted in declaring it to the jury as a presumption raised by law.
2. The presumption of the payment of a debt, arising from the fact that a subsequent demand due on the same account and arising from the same cause has been regularly discharged, is a presumption of fact.

Appeal from St. Louis Court of Common Pleas.

This was an action on a negotiable promissory note for \$500, dated December 15, 1852, drawn by Miron Leslie, and endorsed by the defendant Barret and discounted by the firm of Page & Bacon for said Leslie. Said note was transferred to the plaintiff, Ham, long after maturity. The defence relied on was payment. There was evidence tending to show that in July, 1854, Page & Bacon and M. Leslie had a general settlement of their business transactions and passed receipts. The plaintiff introduced in evidence a receipt dated July 8, 1854, signed by Leslie in the name of the firm of Leslie & Barret, (of which defendant was a member) acknowledging the payment in full of \$500 for professional services rendered Page & Bacon. The case was submitted to the jury upon the following instruction: "If the jury believe from the evidence that the note sued on was paid to Page & Bacon before it was transferred to the plaintiff, they will find for the defendant; otherwise, they will find for the plaintiff." The court refused the following among other instructions asked by the defendant: "2. If the jury believe from the

Ham v. Barret.

evidence that Page & Bacon paid to Leslie the sum of \$500 after the note sued on became due, it affords a presumption that the note in controversy was fully discharged by them. 3. If the jury believe from the evidence that Page & Bacon, after the note in controversy became due and whilst it remained their property, paid to Leslie the sum of \$500, and that Bacon afterwards stated to the witness Haskell that all accounts between the firm of Page & Bacon and said Leslie were fully settled, it is such presumptive evidence of payment by Leslie as will authorize a verdict for defendant."

The jury found for plaintiff.

H. M. Jones, for appellant.

N. D. & G. P. Strong, for respondent.

SCOTT, Judge, delivered the opinion of the court.

This was an action against Barret as endorser of a negotiable note; plea, payment.

We have nothing to do with the question whether the evidence was or was not sufficient to establish the fact of payment. The instructions asked by the defendant and refused by the court, of which complaint is made, were properly refused, inasmuch as they required the court to declare that to be a presumption of law, which was only a presumption of fact to be raised or not as the jury would determine from the circumstances in evidence. There are presumptions of law and presumptions of fact. The former are of a nature to exclude all contrary proof, and which the court will not suffer the jury to disregard; whilst the latter are founded in experience, and may be raised or not as the jury may determine, and for a disregard of which the court grants or refuses a new trial as upon the evidence in all other cases of trial by jury. Where a presumption is one of fact merely, the court is not warranted in declaring it to the jury as a presumption authoritatively raised by law, but should direct them that from the evidence it is their province to determine whether they will raise the presumption or not. The jury,

Boyle v. Hardy.

looking to the bench for the law, would naturally take it that such a declaration was binding and left them no discretion. Where the facts are before the jury, the presumptions or inferences they warrant are questions purely for them. (Best on Presumptions, 46, 51.) Where presumptions of fact founded in experience and in the usual course of the dealings of men are not repelled by contrary evidence, they should be respected by juries, and they have no power arbitrarily to reject them. They must stand until they are overthrown by contrary proof. Presumptions of payment, arising against claims for debts alleged to remain unpaid while subsequent demands due on the same account and arising from the same cause are proved or admitted to have been regularly discharged, are presumptions of fact liable to be repelled by proof to the contrary, and to be found to have application to a case by a jury, subject to the power in the court of granting a new trial. (Matthews on Presumption, 398-9.)

The other judges concurring, judgment affirmed.

BOYLE, Appellant, v. HARDY, Respondent.

1. A. filed a bill in chancery against B. for a general account of a partnership. B., in his answer, set up as a defence that an account of the affairs of the partnership had been stated and settled. Upon a hearing, there was an interlocutory decree finding a settlement as stated in the answer. An amended bill being filed and leave given to either party to surcharge and falsify the account stated, said account was referred to a commissioner "with instructions to examine the same as to errors and omissions on the footing of said account stated, and to state a balance of account and interest due to either party, from the pleadings and evidence now in this cause, and such further competent evidence as either party may produce before him in conformity to this decree." *Held*, that, under this order of reference, the examination before the commissioner was confined to such errors and opinions as were specifically charged in the pleadings and sought therein to be surcharged and falsified.
2. Though all the evidence already in the cause was before the commissioner by virtue of the order of reference, yet balance sheets made out to supply the loss of others that had been in evidence before a former commissioner would not be admissible unless supported by proper testimony.

Boyle v. Hardy.

Appeal from St. Louis Court of Common Pleas.

This was a bill in chancery filed originally in the St. Louis circuit court in the year 1847 for the purpose of settling a partnership account extending through two partnerships. Boyle, Hardy and West were partners. West sold out his interest in the partnership to Boyle and Hardy, who carried on the same business until the dissolution of their firm. Boyle by his bill sought an adjustment of the accounts of both firms. Hardy in his answer set up as a defence that an account had been stated and settled of the affairs of the first partnership. The court referred the cause to a commissioner to take an account of both partnerships, reserving the question whether there had been a settlement of the first partnership. The commissioner having reported, the court, on a hearing of the cause on the question reserved, decreed that an account had been stated and settled as charged in the answer, and gave complainant leave to amend. The complainant refusing to do this in a manner satisfactory to the court, the court dismissed the bill. This judgment was reversed by the supreme court and the cause remanded. (See Boyle v. Hardy, 21 Mo. 60.) A change of venue was then taken to the St. Louis court of common pleas. The court refusing to permit the complainant to amend in such a manner as to draw in question the validity of the account stated and settled and also to surcharge and falsify the same, the bill was again dismissed. The cause was again appealed to the supreme court, which again reversed the decree and remanded the cause, "with directions to refer back the account stated to a commissioner, with instructions to examine the same as to errors and omissions, and with leave to the complainant to surcharge and falsify the same, on the basis of the settlement as found by the court." The defendant having answered the amended bill of the complainant, the court decreed that the account stated and settled of the first partnership, "as heretofore decreed by the court, do stand with liberty to either party to surcharge or falsify the same; and said

Boyle v. Hardy.

account stated is hereby referred to Chester Harding, jr., Esq., who is hereby appointed a commissioner of this court in this behalf, with instructions to examine the same as to errors and omissions on the footing of said account stated, and to state the balance of account and interest due to either party, from the pleadings and evidence now in the cause and such further competent evidence as either party may produce before him in conformity to this decree; and it is ordered that he appoint a time and place," &c. The commissioner, as appears from his report, on commencing the examination of the matters referred to him, "ruled that the examination must be confined to errors and omissions in the account stated, according to the terms of the order, and to such errors and omissions only as are specifically charged and sought to be surcharged or falsified in the pleadings; or in other words, that the account stated must stand under the terms of the order and the condition of the pleadings, unless some one or more of the specific errors or omissions charged in the amended bill should be made out and established by the proof." It also appeared from the report that the commissioner excluded certain balance sheets "made by Pagaud, inasmuch as they were not in evidence before the former commissioner, and no testimony was offered which would entitle them to admission as secondary evidence." The commissioner reported adversely to the complainant as to each and all of the items charged in the bill as errors or omissions in the account stated. The court confirmed the report and dismissed the bill.

Field and Holmes, for appellant.

I. The cause should have been referred to the commissioner with instructions to review the report and to restate the account on the footing of said account settled, with leave to surcharge and falsify as insisted upon by complainant's counsel. Considering the decree as being, in legal substance and effect, the same as that asked for by the complainant, the commissioner erred in not so taking it, and his method of

Boyle v. Hardy.

proceeding in making up his report under the order was erroneous. He improperly restricted the examination to the paper called an account stated and to the particular items therein named, and to the particular items specifically charged in the bill as errors, in the exact form as charged. He erred, also, in ruling that the account stated must stand unless the evidence bearing on any such specific charge should show it to be an error as a particular item in said account stated; also in ruling that the balance sheets should be excluded. (*Twogood v. Swanston*, 6 Ves. 486; *Chambers v. Goldwin*, 5 Ves. 834; *Brownell v. Brownell*, 2 Bro. Ch. 62; *Bullock v. Boyd*, 2 Edw. Ch. 293; *Knisman v. Bake*, 14 Ves. 579; *Colvet v. Markham*, 3 How., Miss., 343; *Mebane v. Mebane*, 1 Ired. Eq. 493; *Garnett v. Carr*, 3 Leigh, 407; *Roberts v. Kuffin*, 2 Atk. 112; 2 Dan. Ch. Pract. 190, 831; *Davis v. Spurling*, 1 Tam. 199; *Farnum v. Brooks*, 9 Pick. 212; *Turner v. Hughes*, 1 Busb. Eq. 186; 1 Hoffm. Ch. Pr. 830; *Gres. Eq. Ev.* 505; 3 *Greenl. Ev.* § 335; *Abrahams v. Hunt*, 26 Penn. 49; *Matthews v. Wallwyn*, 4 Ves. 125; *Pit v. Cholmondeley*, 2 Ves. sr. 566.)

N. D. & G. P. Strong, for respondent.

I. The court properly confirmed the report of the commissioner. He followed the order of the court referring the cause to him. He properly restricted the examination. (See generally, 2 Edw. Ch. 1, 293; 1 Hoffm. Ch. 294; 7 Johns. Ch. 69; 3 Harr. & Johns. 43; 3 Ired. Eq. 58; 1 Daniel. Ch. Prac. 724; 2 id. 762-5; 1 Sto. Eq. § 525.) The complainant could prove no errors he had not charged. There was no error in refusing to receive in evidence the balance sheets made by Pagaud. They were not in evidence before Carrol, the former commissioner. They were not made out until three months after the testimony before Carroll closed. They were not made out from the original books of the partners, but from the books made by Liggett. They were not supported by proper testimony. Pagaud was not sworn as a

witness. Ligget's copies of the original books were very defective and incorrect.

RICHARDSON, Judge, delivered the opinion of the court.

The general history of this controversy to the time that the defendant filed his answer to the complainant's amended bill may be seen in the report of the case in 21 Mo. 60, 62.

The answer to the original bill set up as a defence that an account of the affairs of the first partnership had been stated and settled; and, on a hearing of the cause, the court found the issue for the defendant. The effect of that interlocutory decree, which we are not called on to review, was to drive the complainant to file an amended bill, in which it was necessary to point out specific errors in the account. When the case was last here, it was remanded "with directions to refer back the account stated to a commissioner, with instructions to examine the same as to errors and omissions, and with leave to the complainant to surcharge and falsify the same on the basis of the settlement as found by the court." And the first question to be decided is whether the decretal order referring the cause to the commissioner was properly made and in conformity to the opinion of this court.

It is stated in Daniel's Treatise on Chancery Practice that when a settlement of account is shown to have been procured by fraud, it is a sufficient ground to open the whole account, and the parties will not be in any manner bound by it; but when errors or omissions only are shown to exist, the account will not be opened, and the party will be permitted merely to surcharge and falsify it. The court takes it as a stated account, and the party seeking to open it must specify the errors he relies upon. It is not however necessary for him to prove all the errors named in the bill, for he will be entitled to a decree giving him liberty to surcharge and falsify if he proves some of them; and if he can show an omission for which there ought to be a credit, it will be added, (which is a surcharge,) and if any improper charge is insert-

Boyle v. Hardy.

ed, it will be deducted (which is a falsification). (2 Daniel Ch. Pr. 189, 190.) Judge Story says that, when it is shown the parties have already adjusted an account, the court will adopt, according to circumstances, one of three courses. 1. In case of gross fraud or gross mistake, or undue advantage or imposition, the whole account will be opened and ordered to be taken *de novo*. 2. When the mistake or omission or inaccuracy or fraud or imposition is not shown to stain or affect all the items of the transaction, the court will allow the account to stand, with liberty to the complainant to surcharge and falsify it; the effect of which is to leave the account in full force as a stated account, except so far as it can be impugned by the opposing party, who assumes the burden of proof to establish errors or mistakes. 3. Sometimes, a still more moderate course is adopted, and the account is simply opened to contestation as to one or more items which are specially set forth in the bill of the plaintiff as being erroneous or unjustifiable, and in all other respects it is treated as conclusive. (1 Story Eq. § 523.)

The interlocutory decree, to which the complainant excepted, ordered that the account settled and stated on the 25th of January, 1844, of the first partnership should stand, with liberty to either party to surcharge and falsify it, and that the account should be referred to the commissioner with instructions to examine the same as to errors and omissions on the footing of said account stated, and to state the balance of account and interest due to either party from the pleadings and evidence then in the cause, and such further competent evidence as either party might produce before him. This decree, we think, was in conformity to the remanding order of this court, was adapted to the nature of the bill, and is of the character suggested by Judge Story in his third classification.

It appears that the commissioner examined every specification of error stated in the bill and found that there was nothing to invalidate the integrity or correctness of the account;

and, in our opinion, he properly construed the decree in ruling that the examination should be confined to such errors and omissions as were specifically charged, and that the account should stand unless one or more of the specific errors or omissions charged in the bill were established by proof.

The balance sheets made out by Pagaud were properly rejected as evidence. They were not made from the original books of the parties, but from those transcribed by Liggett, which were shown to be inaccurate in many respects. Pagaud was never sworn in the cause, and they amounted to nothing more than the private papers or written statements of a third person. In *Turner v. Hughes*, Busby's Eq. Rep. 116, the person who furnished the abstracts of the books was the agent of both parties appointed for that purpose, and the examination of the books was made by him in the presence of the parties; but in this case the abstracts were taken from data which the defendant repudiated, and they were not drawn off in the presence of the parties, nor even under the eye of Mr. Carroll, the former commissioner.

The exception to the final decree that the bill was dismissed without taking an account of the business of the last partnership was properly overruled. The allegations in respect of the second partnership was that the errors and admissions in the account of the first partnership were carried into the new concern; but as the decree established that there was no error in the account of the first partnership, it would seem that there was no reason for examining into the accounts of the second partnership. Furthermore, it does not appear that the complainant, either before the court or the commissioner, offered any proof touching the accounts or business of the second partnership; and it may be fairly inferred from his silence on the final hearing, as he did in express terms on a former hearing, that he abandoned any claim to inquire into the affairs or accounts of the second partnership. The other judges concurring, the judgment will be affirmed.

GOFF, Appellant, v. MULHOLLAND, Respondent.

1. Accord without satisfaction is not a good defence to an action of trespass ; so where a lot of ground is wrongfully entered upon and levelled even with the grade of a street, the fact that such trespasser, after commencing the grading of the lot, agrees with the owner of the lot to curb it in return for the privilege of carrying away the earth from its surface, if such agreement remain unexecuted, will not be a bar to an action to recover damages for the trespass.

Appeal from St. Louis Land Court.

This was an action to recover damages for an alleged wrongful entry by defendant upon a lot of ground belonging to the plaintiff and a wrongful removal of earth from the same. The defendant admitted the entry and the removal of the earth and levelling of the lot, and set up as a defence that the same was done by the permission and sanction of the plaintiff. The lot was levelled even with the grade of the street. In the course of the examination of several witnesses, the defendant put this question: "On how many sides would it have been necessary to build a wall to protect Mr. Goff's lot from caving down in the condition in which it was before it was graded?" The witness in response stated the extent and probable cost of the wall. The court, at the instance of the plaintiff, gave the following instructions: "1. If the jury believe from the evidence that the defendant entered upon the lot of ground of plaintiff, as stated in the petition, without the consent or knowledge of plaintiff, and dug the earth and carried the same away, the law is for the plaintiff and the jury should find accordingly. 2. The jury, in their estimate of damages, may take into consideration the object and purpose for which plaintiff intended to appropriate the lot of ground ; and if the defendant, knowing the property not to be his, wickedly to benefit himself without regard to the injury he thereby done plaintiff, entered on said lot, dug down the earth, and converted it to his own use, the jury may render exemplary damages for the injury done, and likewise the value of the earth taken therefrom."

The court gave the following instructions at the instance of the defendant: "1. If the jury believe that Mulholland, after the grading of the lot was commenced, agreed with Goff to curb the lot by way of compensation for taking the earth therefrom, then, whether he has so curbed it or not, they will find for defendant. 2. If the jury believe that the plaintiff knew of the proposed grading of the lot by defendant, or became aware of it while it was going on and made no objection to it while the work was progressing, this is a circumstance from which the jury may infer a contract or understanding between plaintiff and defendant in relation to the grading of the lot; and if they find that any such contract or understanding existed they will find for the defendant. 3. If the jury believe from the evidence that the plaintiff assented to the grading of his lot in the petition described by defendant, and that no more ground was taken than was sufficient for the judicious grading of the lot, then defendant is not liable for a trespass, and the plaintiff can not recover in this action."

The jury found for the defendant.

Cates and Goff, for appellant.

I. The court erred in admitting illegal and incompetent testimony; also in giving the instructions asked by defendant. (1 Bac. Abr. 22; 2 Watts, 424; 3 J. J. Marsh. 479; 8 Ohio, 393; 1 Stew. 476; 2 Keble, 690; 23 Wend. 342; 1 Smith, Lea. Cas. 383; 19 Mo. 204, 360.)

Gantt, for respondent.

I. The court did not restrict any witness improperly in testifying; nor was illegal and incompetent testimony admitted in behalf of defendant. The question with respect to the wall was pertinent. The instructions given for the defendant contained no error. The plaintiff sought to recover as for a trespass *quare clausum fregit*. The agreement made after the commencement of the grading was a bar to an action in that form. (17 Mo. 585; 19 Mo. 152.) The plaintiff did not ask an amendment of his petition.

NAPTON, Judge, delivered the opinion of the court.

The testimony in relation to the necessity of building a wall around three sides of the plaintiff's lot, and the expense which such a wall would occasion, was, in our opinion, irrelevant and incompetent. The plaintiff had a right to retain his lot in such a shape and condition as suited his fancy, and it did not concern the defendant to make calculations as to the amount of expenditure which the indulgence of the plaintiff's taste might occasion. The question for the jury was, how much the value of the lot was diminished, by the defendant's trespass, for the purposes to which it was designed; and it was not, to what expense the plaintiff would be put in protecting it, or in building on it, or whether, upon the whole, the plaintiff might not find it to his advantage to put a business house upon it; for which purpose, all the testimony seemed to concur, the grading of the lot was really advantageous.

The first and second instructions given for the defendant were erroneous. A plea of accord without satisfaction is not a good plea in trespass. (2 Whea. Selwyn, 1354.) An agreement to curb the lot, if not executed, is no bar to the action, and such an agreement could not amount to a waiver or condonation of the trespass. A party can not be turned round from one cause of action to another unless the second is received as a waiver of the first or as a satisfaction of it. In *James v. David*, 5 T. R. 141, the plea to an action of trespass was that both parties had agreed to settle all matters in dispute between them by the payment of a certain sum on one side and by entering into a bond with a penalty that neither would commence an action against the other, but the judges held the plea to be bad. Mr. Justice Ashhurst said, "that in order to found an action on this agreement, the plaintiff must have stated not only the agreement, but also that he tendered an obligation in £100 ready executed to the defendant, and that the defendant refused to execute," &c. Here the question does not arise upon the form of a

Ridgley v. Stillwell.

plea, but it is manifest from the evidence that the agreement, which is set up as a bar, is one of which the plaintiff could not have availed himself, as it was only proved by his own declarations. If the plaintiff had received a sum of money in satisfaction of the trespass, that, of course, would be a bar; so, if he had received the defendant's note for that sum in satisfaction of his demand for damages; but a mere verbal promise to pay a certain sum of money or do a certain act, if not performed, is no satisfaction. Such promises could hardly amount to an *accord*, and certainly not to accord and satisfaction, and are no bar to the action, although, if amounting to an accord, they might be evidence upon the quantum of damages.

The other judges concurring, the judgment is reversed and the cause remanded.

RIDGLEY, Defendant in Error, v. STILLWELL, Plaintiff in Error.

1. A parol lease for a term of years has the force and effect of a tenancy from year to year.
2. Justices of the peace can not specifically enforce a parol contract concerning land on the ground that it has been taken out of the statute of frauds by part performance.
3. A. let certain premises to B. for a term of years; the letting, being by parol, had the force and effect at law of a tenancy from year to year. A. gave B. due notice to quit, and brought his action of forcible detainer before a justice of the peace. B. relied for a defence upon the fact that he had entered upon said premises under a parol lease for ten years, while the building thereon was not completed, and had made improvements thereon, and had paid rent under said parol agreement. *Held*, that the justice of the peace had no jurisdiction to enforce the equities arising out of such a defence, and that, if the defendant was entitled to the specific enforcement of the parol agreement, he might have enjoined in a court of competent jurisdiction the proceedings before the justice until his equity could be determined.

Error to St. Louis Land Court.

This was an action of forcible entry and detainer brought before a justice of the peace March 21, 1857, and removed

Ridgley v. Stillwell.

to the land court by *certiorari*. The plaintiff proved that defendant went into possession of the premises in March, 1851, under a verbal letting; that due notice to quit was given on the 21st of August, 1856; also a written demand of possession on the 19th March, 1857; also, the monthly value of the rents, &c. The defendant proved that the plaintiff put up the building on the premises, which was not entirely completed when the defendant went into possession. The defendant offered to prove that in the month of March, 1851, the plaintiff, by a verbal agreement with the defendant, rented the premises in question to the defendant for the term of ten years from March 15, 1851; that under said agreement the annual rent was fixed and was to be determined by computing ten per cent. on the cost of the land and fifteen per cent. on the cost of the building; that the defendant entered the premises under said agreement, and made improvements in the building by putting up fixtures and partitions; that he had occupied the premises and carried on his business from the time he entered to the present, and that he had paid rent to the plaintiff from time to time under said agreement. The defendant also offered to prove the cost of the land and the building erected thereon, for the purpose of showing what the annual rent of the premises would amount to under said agreement. On the objection of the plaintiff, the court ruled out this testimony. It was not proved that the rent paid by defendant to plaintiff was accepted by the latter under the alleged agreement set up by defendant.

The court gave the following instructions at the instance of the plaintiff: "1. If the jury find from the evidence that the defendant Samuel Stillwell became the tenant of the plaintiff Stephen Ridgley on the 15th day of March, 1851; that there was no written lease or agreement between the parties regulating such tenancy; that said Stillwell was the tenant of said Ridgley on the 21st day of August, 1856, occupying the premises described in plaintiff's complaint; that on said 21st day of August, said Ridgley caused a copy

of the notice read in evidence to be served on said Stillwell; and that said Stillwell continued in the possession of said premises until after the institution of this suit; then the plaintiff is entitled to recover."

The defendant asked and the court gave the following instructions: "2. If the finding is for the plaintiff, the jury, in estimating the rents and profits, may take into consideration what would be a fair and reasonable rent for the premises from the time the defendant's tenancy terminated. 3. The plaintiff can not recover in this action unless he has shown in evidence to the satisfaction of the jury that he let the premises in question to the defendant; that defendant went into possession of the premises as tenant of the plaintiff under such letting; that the time or term for which the premises were let to the defendant had fully elapsed before this suit was begun; and that defendant wilfully held over or continued to occupy the premises after the termination of the time for which they were let to him and after demand had been made upon him in writing by the plaintiff for the deliverance to him of the possession of said premises." The court, of its own motion, instructed the jury as follows: "4. If the jury find the notice to quit, given in evidence in this case, was served on the defendant on the 21st day of August, 1856, then the time for which the premises were let to the defendant terminated on the 15th day of March, 1857."

The defendant also asked the following instructions, which the court refused: "5. If the plaintiff, in the year 1851, by a verbal agreement with the defendant, let the premises in question to him for a term of years and reserved rent therefor; if the defendant went into possession of the premises as the tenant of plaintiff under such verbal letting, and if the time or term for which the premises were so let to the defendant had not fully elapsed before this suit was begun, then the plaintiff can not recover in this action and the jury should find for the defendant. 6. If the plaintiff, by a verbal agreement, let the premises in question to the defendant, which letting began on the 15th of March, 1851, and

Ridgley v. Stillwell.

was to continue three years; if the defendant in pursuance of such letting entered the premises, and if he has continued ever since in the peaceable possession of the premises to the time of bringing this suit, then the plaintiff is not entitled to recover in this action. 7. The notice read in evidence which was served on the defendant on the 21st day of August, 1856, is not sufficient to terminate the tenancy of the defendant created by the verbal letting given in evidence, unless it has been shown in evidence to the satisfaction of the jury that said notice was served upon the defendant while on the premises in question, or on some one occupying said premises under the defendant, or his agent or servant, and that such service was full six months before the 15th March, 1857."

The jury found for the plaintiff.

Krum & Harding, for plaintiff in error.

I. The only point made on behalf of the plaintiff in error is that the court erred in excluding the proof offered by him. The offer included, 1st, a parol demise for ten years; 2d, the entry of defendant under the demise; 3d, improvements made by the lessee after going into possession; 4th, payment of rent under the agreement. That these facts took the letting or agreement out of the statute of frauds, see 15 Mo. 365; 18 Mo. 78; 26 Mo. 221; 7 Conn. 224, 342; 2 Hill, 421; 1 Sandf. Ch. 579; 14 Verm. 440; 8 N. H. 9; 1 Root, 77, 142, 233, 497, 594; 2 Root, 191; 3 Stew. 207; 9 Pet. 86.

Knox & Kellogg, for defendant in error.

I. The evidence offered was properly excluded.

RICHARDSON, Judge, delivered the opinion of the court.

By the statute of frauds, the estate in this case, being created by parol, had only the force and effect of an estate at will, (1 R. C. 1855, p. 806,) which is construed to operate as a tenancy from year to year. (*Kerr v. Clark*, 19 Mo. 132.)

Whittelsey v. Kellogg.

The theory of the defence which the defendant proposed to make is, that part performance of the parol contract took it out of the statute and entitled him in equity to a specific performance; but this proceeding was for an unlawful detainer, which was necessarily commenced before a justice of the peace, who had no power to inquire and decide whether the contract ought to be enforced and to give the equitable relief the defendant sought. If the defendant was entitled to have the parol agreement executed, his course was to have enjoined, in a court of competent jurisdiction, the proceedings before the justice until his equity could be determined.

The judgment will be affirmed, with the concurrence of the other judges.



WHITTELSEY *et al.*, Plaintiffs in Error, v. KELLOGG *et al.*,
Defendants in Error.

1. A call in a deed for a boundary certainly ascertained will prevail over a call for distance.
2. The construction of deeds is a matter for the court and not for the jury; though it is the province of the jury to determine *where* the boundaries called for in a deed are located, it is the province and duty of the court to declare *what* the boundaries are that control the location.
3. Although a witness, a surveyor, should be improperly permitted to give his opinion upon a matter of law, as to declare what are the controlling calls of a deed, a judgment will not be reversed for this impropriety, if the opinion given be substantially correct and such as can not have prejudiced the party complaining of it.

Error to St. Louis Land Court.

This was an action in the nature of an action of ejectment. Both plaintiffs and defendants claim title under Thomas M. Knox. Knox was the owner of a tract of land fronting 218 feet six inches on the Carondelet road, in the city of St. Louis. This tract was the north part of a tract known as the Petit tract. This tract interfered with the common of St. Louis and with land assigned to the public schools. Knox

Whittelsey v. Kellogg.

obtained title by compromise with the city of St. Louis. In 1843 and 1844 Knox executed three several conveyances to Larkin Deaver. The descriptions of these deeds are sufficiently set forth below, in the opinion of the court. Defendants claim title under L. Deaver. Plaintiffs claim title by virtue of a quit-claim deed from T. M. Knox to D. Dorwart, dated October 22, 1845. The question to be determined in this cause is whether the land sought to be recovered was embraced in the deeds of Knox to Deaver; and this question is decided by determining whether said deeds embraced the whole of Knox's land, or, rather, whether the land thereby conveyed extended as far north as the north line of the Petit tract, which was the south line of the Lami or Cerré tract. The court ruled in substance that the call in the deed of Knox to Deaver, dated March 25, 1844, for the lot of Cerré on the north brought the land sought to be recovered in this suit within the description in said deed. During the trial the court asked a witness, a surveyor, "how, as a surveyor, without any knowledge of the facts and that surveys had been previously made, he would bound said lot described in deed of June 7, 1843," the deed from Knox to Deaver? The witness was permitted, against the objection of the plaintiffs, to respond to this question and to similar questions with respect to the other deeds of Knox to Deaver.

The jury found for defendants.

Whittelsey, for plaintiffs in error.

I. The court erred in asking Cozens how, as a surveyor, he would run the lines of the deed of June 7, 1843. This was a question for the court to determine. (24 Mo. 113; 4 Hawks, 64; 4 Monr. 63; 1 Dev. & Bat. 425.) The court, in its instruction, submitted a matter of law to the jury. What are the boundaries is a question of law; the *place* of the boundaries is a question of fact for the jury. (Dev. & Bat. 425; 4 Hawks, 64; 4 Monr. 51; 9 Mo. 581; 21 Mo. 210.) Known and visible monuments will control the other calls of a deed. The descriptions in this case were taken

from actual survey. The corners established and existing were actual monuments. (15 Mo. 89.) Courses and distances of actual survey will prevail over the less certain call of adjoining owners. (11 Conn. 332; 5 Ham. 434; 9 Cranch, 178.) When actual corners are established, they must control. (8 Mo. 555; 21 Mo. 170; 6 Mo. 219; 13 Mo. 697; 17 Mo. 191.) The instructions given were erroneous. The court erred in refusing the instructions asked by plaintiffs.

Knox & Kellogg, for defendants in error.

RICHARDSON, Judge, delivered the opinion of the court.

Both of the parties claim under T. M. Knox, and the question is whether Knox, by his three deeds to Deaver, conveyed all his interest in the Petit tract, so that there was nothing left on which his subsequent deed to Dorwart could operate.

The northern line of the Petit tract is coincident with the southern line of the Lami tract, and the first portion of the land which Knox acquired was a strip of fifty-two feet, taken from the northern side and running the whole length of it, which was bounded on the north by the Lami tract claimed by Cerré; and, although there is some dispute as to Knox's southern line, all the parties concede that his northern boundary was the southern boundary of the Lami or Cerré tract.

The first deed of Knox to Deaver, dated January 7, 1843, conveys, by a very clear description, all the land he owned in the tract west of a point on his northern line distant twelve chains and forty links from Carondelet avenue. The calls of the deed are "commencing at a point in *Knox's northern boundary line*, being distant, &c., thence, with *said Knox's northern boundary line*, north, seventy and one-quarter degrees west, seven chains and one link, to *Knox's north-western corner*; thence," &c. After making this deed, he had remaining the eastern portion of the tract fronting 218 feet six inches on Carondelet avenue, and by his deed to Deaver

of January 23, 1844, he conveyed the southern half of the residue fronting one hundred and nine feet three inches on Carondelet avenue. In this deed Knox assumed his lower line to be further south than it really was, but it is manifest that he intended to convey half of all he had. The portion left, after satisfying the two deeds already mentioned, was a piece bounded north by the Lami or Cerré tract, west by a part of the land first sold to Deaver, south by the part last sold, and east by Carondelet avenue; and this part he intended to convey by his third deed dated March 25, 1844. The call in the description is "beginning at the south corner of said Deaver's lot (on Carondelet avenue), thence north 109 feet three inches *to lot of one Cerré*, being school lands, thence west *along said Cerré's* line to a lot of said Deaver; thence south," &c. It is impossible to reach Cerré's line without going to Knox's extreme northern line, and as that line is so described as to be regarded as a monument, it must prevail over distance, which is most uncertain; for it is a familiar rule that the least certainty of description in deeds must yield to the greater certainty.

The legal construction of the deeds from Knox to Deaver was properly a matter for the decision of the court; for, though the jury must ascertain as a fact where the boundaries of a grant are, it is the duty of the court to declare what the boundaries are that control the location; (*Doe v. Paine*, 4 Hawks, 64;) and, under the circumstances of this case, the court properly might have charged that the land conveyed by the first and third deeds was bounded on the north by the Lami or Cerré tract, and that therefore nothing passed by the deed to Dorwart under which the plaintiffs claim.

The objection, that a witness was allowed to give his opinion as to the location of the land described in the deeds, may be answered by repeating what was said by this court in *Evans v. Greene*, 21 Mo. 210, that a judgment will not be reversed because "a witness has given his opinion upon a matter of law, when we see that the opinion given was sub-

Hall v. Webb.

stantially correct and could not have prejudiced the party complaining of it." The other judges concurring, the judgment will be affirmed.



HALL, Appellant, v. WEBB *et al.*, Respondents.

1. *Quere*, how far is a deed of trust conveying a stock of goods in trade and also all goods and stock that may belong to the grantor during the continuance of the trust valid and operative?

Appeal from St. Louis Court of Common Pleas.

This was an action for the possession of certain goods, wares and merchandise in possession of defendants, A. F. W. Webb and John H. Young. The plaintiff Hall sues as trustee under a deed of trust dated January 1, 1852, executed by Restcome P. Perry. This deed of trust was made to secure the payment of two promissory notes for \$10,000 each, both dated December 1, 1851, and payable to the order of Thomas & Franklin—one on the first of January, 1855, and the other on the first of January, 1856. By this deed, which was recorded January 28, 1852, the said Perry did "bargain, sell, transfer and deliver unto the said party of the second part, all the stock in trade, goods, wares and merchandise of every kind and description in the hardware store, No. 86 North Main street, in the city of St. Louis, now occupied by said party of the first part, as well as all the goods and stock now in course of transportation belonging to said party of the first part, as also all the stock in trade of every kind which during the existence of this trust shall belong to said party of the first part either in said store or in any other store or place; hereby intending to convey to said party of the second part all the goods of every kind and stock which now belong or may during the continuance of this trust belong to said party of the first part, whether the

Hall v. Webb.

same be in said hardware store or in any other store, or in course of transportation; to have and to hold," &c. About the time of the execution of this deed of trust John H. Young became a partner of said Perry. Young continued to be a partner of said Perry until August, 1854, when he sold his interest in the partnership to Perry. Perry at this dissolution agreed to pay the partnership debts and to hold Young harmless. He executed a deed of trust upon the stock of goods to secure Young against his liability for the partnership debts. This deed was dated December 8, 1854, and was made to defendant Webb as trustee. Webb took possession under this deed the latter part of December, 1854. There was evidence tending to show that when the sheriff took possession of the stock of goods in the present suit, there was remaining on hand of the goods in the store on the first of January, 1852, but few packages, worth about eight or ten dollars.

Hall, the plaintiff in the present suit, giving the bond required by statute, took possession of the goods sued for. He sent them to auctioneers and they were sold for \$8,445.12.

The court gave the following instructions at the instance of the defendants: "1. If the jury find from the evidence that, at the institution of this suit, the defendant Young was liable for debts contracted by R. P. Perry & Co. to a greater amount than the value of the property in the possession of said defendants; that said property was delivered by said Perry to said defendants or either of them for the purpose of securing and paying said debts; and that the property in possession of said defendants at the institution of this suit was purchased by said Perry subsequent to the execution and delivery of the deed of trust under which the plaintiff claims, then the plaintiff can not recover. 2. If the jury find from the evidence that the property for the recovery of which this suit is instituted was purchased by the firm of R. P. Perry & Co. (composed of R. P. Perry and John H. Young) after the execution of the deed of trust to the plaintiff; that the said firm of R. P. Perry & Co. was dissolved before the

institution of this suit; that at the time of the dissolution it was agreed that said Perry should pay all the debts for which said firm was liable and should execute a deed of trust on said property to secure the said John H. Young from all liability on account of said debts; that he did execute such deed of trust; that at the institution of this suit the said firm was liable for debts so contracted to a larger amount than the value of the goods in possession of the defendants, then the plaintiff can not recover. 3. Even if the jury shall find from the evidence that there was a package or packages of the value of ten or twelve dollars in the possession of defendants at the institution of this suit, which was in the store of R. P. Perry & Co. at the execution of the deed of trust under which plaintiff claims, the plaintiff can not recover unless he required the defendants to point out said property before the institution of the suit, and defendants refused to do so, and then can recover the above property only, unless they find for the plaintiff under the other instructions given in this case. 4. The jury will find the value of the property at the time it was delivered by the sheriff to the plaintiff, and also assess the damages suffered by the defendants by reason of the property being taken out of their possession, not exceeding the rate of six per cent. per annum on the value of the property from the commencement of this suit until the present time."

The plaintiff asked the court to give the following instructions to the jury: "1. Usury, even if proved, is no defence to this action. 2. If the jury find from the evidence that R. P. Perry on the 7th day of August, 1854, bought the interest of defendant Young in the firm of R. P. Perry & Co. and continued the same kind of business at the same place and with the stock so bought by him, then the deed of trust given in evidence by the plaintiff attached upon the stock of said Perry, and continued to bind the same until the commencement of this suit. 3. If the jury find from the evidence that the deed of trust given in evidence by plaintiff was executed and delivered before or at the time the part-

nership was formed between himself and defendant Young; that before said partnership was formed said Perry had transacted a hardware business at the same store and his stock constituted the same stock of the said concern at its commencement, and that said Perry on the 7th day of August, 1854, purchased of defendant Young his interest in the concern, and continued to carry on the same kind of business at the same stand, and also continued the stock in said subsequent business, then the said deed of trust continued to bind the stock of said Perry on the 23d day of December, 1854, and until the commencement of this suit. 4. If the jury find from the evidence that the deed of trust and notes given in evidence by the plaintiff were executed by Perry and delivered by him at or about the times of the dates thereof, and that said Perry, either by himself or as a partner of the firm of R. P. Perry & Co., composed of said Perry and said defendant Young, continued to do business in the same store named in said deed of trust, and that in August, 1854, the said firm was dissolved and said Perry purchased from said Young all his interest in said stock and continued the same business at the same place, then all the stock received by said Perry in said store after the said dissolution and purchase is bound by said deed of trust." Of these instructions the court gave the first and refused the others.

The jury found for the defendants and found the value of the property replevied to be \$12,374.37, and assessed the damages at the sum of \$1,767.38.

Shepley and Polk, for appellant.

I. The deed of trust was operative to convey to plaintiff all the property and stock of goods in the store at the time of seizure. So far as the grantor was concerned, the after acquired property passed by it; so also as against every body. This was the rule in equity at a very early day. (1 Hare, 560; 4 My. & Cr. 408; 6 Man. & Grang. 247.) It is now the rule at law. (Abbott v. Goodwin, 20 Maine, 408; Maudlin v. Robinson, 11 Ala. 980; Floyd v. Morrow, 20

Ala. 356; 14 Conn. 255; 2 Story 630, 555; Pierce v. Emery, 32 N. H. 484; Page & Bacon v. Gardner, 20 Mo. 507.) But even if such a conveyance would not be sustained against creditors, yet defendants occupy no such position. The deed of trust was recorded and defendant Young had actual notice of it.

II. There was no evidence before the jury that authorized the giving of the first instruction asked by the defendants. The property was not delivered to defendants or either of them for the purpose of securing and paying the debts of the firm of R. P. Perry & Co. The third instruction given is erroneous. It left out of view the property in course of transportation. It improperly makes it the duty of the plaintiff to point out the packages in the store at the time of the execution of the deed of trust. It is averred in the petition and not denied in the answer that plaintiff demanded the goods before suit and was refused. If they had any thing belonging to plaintiff, it was their duty to deliver it or offer to deliver it. They refused to deliver any portion.

III. The evidence as to the intention of defendants to send the goods to auction immediately is an element in determining whether the goods brought when sold a fair price; it should have been admitted.

IV. The deed of trust is not void upon its face. The case of Brooks v. Wimer goes to no such extent.

V. Usury can not, even if it exists, be taken advantage of by defendants.

Knox & Kellogg, for defendants in error.

I. The deed of trust was void as creating a trust in favor of the grantor Perry. The necessary consequence of the deed was to hinder and delay creditors. The deed in effect provided that Perry was to remain in possession and buy and sell in the ordinary course of business until default in the payment of the notes secured, which were not payable until three and four years after the execution of the deed. (Brooks v. Wimer, 20 Mo. 503; 15 Mo. 459.) Besides, the

Hall v. Webb.

property claimed was acquired after the execution of the deed of trust. (8 *Maryl.* 301.) At the dissolution Perry assumed the payment of the debts of the partnership, and agreed to secure Young against all liability on account of the debts of the firm, and gave him a deed of trust. Franklin & Thomas were the creditors of Perry only. The whole property was insufficient to pay the firm creditors. The debt due Franklin & Thomas was tainted with usury ; it was therefore void. The facts show that the deed of trust was made with intent to defraud the creditors of Perry.

NAPTON, Judge, delivered the opinion of the court.

The case of *Mitchell v. Winslow*, 2 *Story*, 639, referred to in the opinion of this court in *Page & Bacon v. Gardner*, 20 *Mo.* 511, can not be reconciled, in all respects, with the decisions of this court in *Brooks v. Wimer*, 20 *Mo.* 506, and several subsequent cases reiterating the same doctrine. So far as the case goes to sustain the judgment in *Page & Bacon v. Gardner*, no exception is designed to be taken to it, as the opinion and judgment in that case is not supposed to conflict with the views expressed in *Brooks v. Wimer*. But an examination of Judge Story's opinion in *Mitchell v. Winslow* will show that he entertained views, in relation to assignments, totally adverse to the positions taken by this court in *Brooks v. Wimer* ; and therefore, although the assignment in the case of *Mitchell v. Winslow* in many respects resembles the present, Judge Story's opinion upholding it can not be regarded authoritative here. In the case of *Moody v. Wright*, 13 *Metc.* 17, the opinion of the supreme court of Massachusetts, wherein *Mitchell v. Winslow* is reviewed, seems to conform more nearly to the decisions made here, and in truth exactly accords with the theory upon which the present case was tried in the court of common pleas.

It is not necessary to pass upon the validity of the deed of trust made in 1852 to the trustee of Franklin & Thomas, who is the present plaintiff. It was treated as operative in

the instructions given to the jury so far as the goods in store at its date were concerned. It purported to convey "all the stock in trade, goods, wares and merchandise of every kind and description in the hardware store, No. 86 north Main street, St. Louis, and then occupied by Perry," as well as "all the goods and stock then in the course of transportation belonging to said Perry; as also all the stock in trade of every kind which, during the existence of said trust, should belong to said Perry either in said store or any other store or place; thereby conveying and intending to convey to said trustee all the goods of every kind and stock which then belonged or during the existence of said trust should belong to said Perry," &c. The notes, to secure which this deed was made, were payable in three and four years from date. There can be no doubt that it was the intention of all the parties to this instrument that Perry, the assignor, should remain in possession of his stock of goods thus assigned, and carry on his business as a hardware merchant; and the facts proved upon the trial fully established that this was understood by all parties as the proper construction of the deed. In this view of the case the instruction given by the court in relation to the small package worth five or ten dollars, which was supposed to be part of the original stock conveyed to plaintiff in 1852, could not have been prejudicial to the plaintiff, and its propriety becomes perfectly immaterial.

But assuming the assignment to Hall as *prima facie* valid, and adopting the principle upon which the case was tried, that the stock on hand in 1852 passed by the assignment, the sheriff would hardly be authorized to take possession of a stock of goods worth twelve or fifteen thousand dollars, because there happened to be in the stock a single package worth ten dollars which he was justified in seizing; and the effect of a reversal for a misinstruction on this point, if any such had occurred, would only be to reduce the verdict to the extent of the value of this single package. Such a course would only lead to an unnecessary accumulation of costs.

The court committed no error, in our opinion, in exclud-

St. Louis Public Schools v. Risley.

ing proof of the defendant's supposed intentions in relation to the disposition of the property. What an owner intends to do with his property, whether he designs to sell it at auction or privately, or to retain it for his own use, or to give it away, is not a matter which concerns a trespasser. The point of inquiry is its value, and although the owner may design to destroy it or burn it up the next day, that circumstance does not diminish or in any way affect the responsibility of a stranger who illegally and wrongfully takes possession of it. All the testimony offered in this case concerning the value of the goods, either by auction sales or otherwise, was permitted, and the verdict of the jury has fixed the value at a sum exceeding, indeed, what seems to us as a fair valuation, but which we have no power to change, sanctioned as it has been by the court which tried the case.

Judge Scott concurs. The judgment will be affirmed.

ST. LOUIS PUBLIC SCHOOLS, Appellant, v. RISLEY, Respondent.

1. If the plaintiff in an action of ejectment fail at the trial to establish his right to a recovery upon the title relied on by him, he may resort to another title; it is improper to require him to elect one of two titles, upon which he announces his purpose to rely, as that upon which he must base his right to a recovery, even though such titles be inconsistent with each other.
2. Where an instrument purporting to be the act of a corporation has the common seal of the corporation attached, and the signatures of the proper officers are proved, it will be presumed that such officers had authority from the corporation to execute the same.

Appeal from St. Louis Land Court.

This was an action in the nature of an action of ejectment by the Board of President and Directors of the St. Louis Public Schools against William Risley for the recovery of a portion of block No. 856 in the city of St. Louis. The cause being called for trial and the jury sworn, the counsel for the plaintiff explained to the court and jury the general nature

St. Louis Public Schools v. Risley.

of the case, and stated in general terms what he expected to prove before the case was finally submitted to the jury for their consideration. He stated that he expected to show title in plaintiff by virtue of an assignment dated December, 1855, by the United States to the city of St. Louis for the support of schools in conformity to the various acts of Congress. The counsel further stated that plaintiff had another title, entirely distinct from that under the above assignment, which he expected to adduce proof to sustain. He stated that he expected to show that the premises in controversy, in the years 1820 and 1821, when the state of Missouri was admitted into the Union, were west of the main channel of the Missouri river, and were covered with the waters of said river when it was at the ordinary or middle stage, being below the top of the main bank or shore; that since 1850 said premises have been as high as the top of the shore of the river; that the state of Missouri, by act of the general assembly of March 3, 1851, (Sess. Acts, 1851, p. 573,) transferred all the right, title and interest of the state in and to said premises to the city of St. Louis; that the legislature by an act approved November 23, 1857, (Sess. Acts, Adj. Sess. 1857, p. 488,) authorized and empowered the mayor of the city of St. Louis, in the name of the city, to convey certain real estate, including that in controversy, to the plaintiff; that the mayor of St. Louis did, by a deed dated December 26, 1857, convey all the interest of the city in said premises to the plaintiff. The counsel for the defendant here moved the court to compel the plaintiff, before introducing any evidence, to elect which one of said titles "he would introduce, and to compel the plaintiff to rely on the title so elected and no other." The plaintiff moved the court not to compel an election until after the evidence was all in and before the cause was submitted to the jury. The court required the plaintiff to elect. The plaintiff, under protest and exception, elected the title derived through the city of St. Louis and state of Missouri; and read in evidence in support thereof the said act of the general assembly, approved

March 3, 1851; (see Sess. Acts, 1851, p. 573;) also said act of November 23, 1857. (See Sess. Acts, 1857, Adj. Sess. p. 488.) The plaintiff then offered in evidence a deed of conveyance dated December 20, 1857, purporting to be executed by the city of St. Louis, by John M. Wimer, its mayor, under and by virtue of the authority of the said act of the general assembly approved November 23, 1857. The deed was duly acknowledged and recorded. The court, on the objection of the defendant, refused to admit said deed in evidence. The plaintiff then offered to introduce evidence in support of the title under the assignment to the schools by the United States. The court refused the offer on the ground that the plaintiff had elected to rely on the title derived through the city of St. Louis and the state of Missouri. The plaintiff took a nonsuit, with leave, &c.

Casselberry, for appellant.

I. The plaintiffs had a right to introduce all of their titles in evidence. The court erred in compelling plaintiff to elect.

II. The court erred in excluding the deed from the city to the plaintiff. The act of November 20, 1857, conferred all the necessary power on the mayor to convey the land in controversy to the schools. (2 Hill, 489; 13 Wend. 325; 6 Mo. 475; 13 Mo. 611; 18 Mo. 220.) For more than twenty years the premises in controversy were used as a wharf. An enabling act was necessary before the city could convey to the schools. The city holds the public thoroughfares for the public. The legislature could as well authorize the mayor to make the conveyance as the council and mayor, or the council alone. The mayor was the sworn representative of the people. The act does not say he *shall* make the deed; it says that he is "authorized and empowered" to do so. It is to be presumed that he reflects the will of the people.

E. Bates, for respondent.

I. The plaintiff sets up two titles not only different from each other, but flatly contradictory; they can not stand to-

gether. It was altogether proper for the court to refuse to try both the contradictory titles in the same action. The practice at common law of requiring a party to elect which of two inconsistent claims or defences he will rely upon is too familiar to need a reference to authorities. The power of the court in this regard is a discretionary power. (8 Mo. 334; *State v. Fulkerson*, 14 Mo. 49; *Mooney v. Kennett*, 19 Mo. 551; *Page v. Freeman*, 19 Mo. 421.) Duplicity and multifariousness are, under our code, still objections to pleadings. (17 Mo. 228.)

II. The deed from the mayor to the schools was properly ruled out. The deed was made by virtue of a special grant of power by statute, and the power was not strictly pursued. Besides, the act of the general assembly, as a grant of power, was void. The city of St. Louis is a person in law competent to grant and convey its lands. The legislature has no power to authorize a stranger or one of the servants of the city to grant away its lands.

SCOTT, Judge, delivered the opinion of the court.

We do not see on what ground the court compelled the plaintiff to elect on which of his titles he would base his right of recovery. This is an action of ejectment, and the plaintiff's right to the immediate possession of the land in controversy is averred in the petition. Now if the plaintiff, in making out his case, should fail to establish one title on which he relied, on what principle would he be restrained from falling back on another title which showed his right to a recovery? Is not this every day's practice? We do not see what connection the power assumed by the courts, of compelling the party to elect when causes of action are improperly joined, has with this question. Here there is but one cause of action for one specific thing, and there can be no reason why, if the plaintiff fails to establish his right to recover by one title, he should be denied the privilege of resorting to another.

It will not be maintained that the legislature can authorize any person or officer to convey away the property of a corporation against its will. But the efficacy of the deed, under which the plaintiff claims, does not necessarily stand on the act of the general assembly authorizing the mayor of the city to execute it. The objection, that this deed is not the act of the corporation, does not come from the corporation itself. From any thing that appears, the corporation is satisfied with the act of the mayor, and is willing to abide by it. If the corporation had denied the authority of the mayor, we know that there would have been no want of evidence of the fact. When a municipal corporation is satisfied with the act of its agent, and is willing that it should stand, there should be a solid reason why third persons, who have no interest in the matter, should be permitted to invalidate it. If an act has been done for and in the name of another, and he, being aware of it, does not object to the want of authority in his agent, why should a third person be suffered to do it for him? These considerations serve to show the reasonableness of the rule in law, that when the common seal of a corporation appears to be affixed to an instrument and the signatures of the proper officers are proved, courts are to presume that the officers did not exceed their authority. The contrary must be shown by the objecting party. (Angel & Ames on Corp. Sec. 224; *The President, Managers & Company of the Berks & Dauphin Turnpike Road v. Myers*, 6 Serg. & Rawl. 12.) This is not a case involving the question whether a corporation under its charter has authority to do an act. Where the question is as to the power of a corporation as an entire body to do a thing, there, of course, the affixing of the seal is no evidence of its authority. But when an act is within the powers of a corporation, and its existence is witnessed by an instrument clothed with the formalities requisite to bind it, there is no hardship in the rule which imposes on one objecting to its validity the necessity of showing that it was without the assent necessary to its existence.

Reversed and remanded.

BLACKMORE, Appellant, v. BOARDMAN, Respondent.

1. A covenant for perpetual renewal of a lease is valid.
2. A covenant for renewal of a lease is an incident to the lease and will pass by an assignment of the unexpired term ; a sale by the sheriff under an execution of the interest of the lessee in the land will pass to the purchaser the covenant for renewal.
3. The secretary of the board of directors of the St. Louis Public Schools is a proper person to whom to deliver applications for renewal of leases made by said board with covenants of renewal. The declarations of a deceased secretary, made when applied to in behalf of an applicant for renewal before the expiration of the time within which demand of renewal should be made, are admissible in evidence to show that the application for renewal had been received by him as secretary in due time.

Appeal from St. Louis Land Court.

This cause was heard before the supreme court upon the following agreed statement of facts : " This was an action of ejectment brought by the plaintiff Blackmore against the defendant Boardman to recover possession of the premises in the petition mentioned and described, being a lot or parcel of ground situated in the city of St. Louis, containing one arpent and 66-100. The defendant answered, and the cause, by consent, was tried by the court. The facts as they appeared on the trial were as follows : By deed dated October 25, 1847, the board of President and Directors of the St. Louis Public Schools demised and leased to the plaintiff Blackmore a certain tract or parcel of land of upwards of six arpens, of which that mentioned in the petition is part, for the term of ten years, commencing from and after October 15, 1847. Said lease contained a covenant for renewal in the following terms : " And it is hereby covenanted and agreed by and between the said parties, that at the end of the term hereby demised this lease shall be renewable for the further term of ten years ; and so on from time to time perpetually at the option of the party of the second part, his executors, administrators or assigns, he or they giving to the party of the first part, in every instance, a notice in writing

Blackmore v. Boardman.

of his or their wish to renew the same three months at least before the end of the term.) And every renewal lease shall contain all the covenants, agreements, clauses and stipulations herein contained, with this exception, that the annual rents to be reserved in every renewal shall be six per centum upon the value of the demised premises, exclusive only of improvements thereon placed by the said lessee or his legal representatives, if any, which value shall be estimated by disinterested freeholders of the city of St. Louis, one of whom shall be selected by the party of the first part, and the other by the party of the second part, his executors, administrators or assigns; and to be paid quarterly.'

"On the 6th of January, 1857, said premises so leased to Blackmore were duly sold by the sheriff of St. Louis county to Augustus W. Lewis under executions on judgments obtained by one William Lingo against said Blackmore in March and May of 1856, and the sheriff conveyed the same to said Lewis by deed dated February 12, 1857, which deed being duly acknowledged was recorded February 23, 1857. A few days after his purchase, Lewis went into possession of that portion of the premises sued for, and while in possession conveyed the whole of said tract of land to John F. Hagne, by deed dated February 25, 1857. The defendant Boardman holds under said Hagne.

"Previous to the expiration of the original lease, a notice in writing or application for renewal on the part of Hagne, in due form for that purpose, was left at the office of the board of Public Schools. The evidence on that subject was as follows: The notice was left at the office of said board on July 3, 1857, with a man in the office of said board, but who was not one of the board, who at the time was either dusting or sweeping out the office. The secretary was not in at the time, and the man who was there took the notice with instructions to hand it to the secretary as soon as he should come in. John H. Watson was the secretary at the time to the board. He has since died. He (Watson) a day or two after acknowledged to the witness Kurlbaum—who

left the notice at the office of the board July 3, 1857, and who called there to see about the same — that said notice had been received. There was no entry on the minutes of the proceedings of the board showing when said notice was received, though it was shown that the same was officially before the board August 11, 1857, being the second meeting of the board held after said notice was left at the office. To the testimony of the said witness Kurlbaum as to what was said to him by the deceased secretary, plaintiff objected at the time; but the court overruled the objection and plaintiff duly excepted. The covenants of the lease had in all other respects been complied with. Plaintiff Blackmore, within the time provided for that purpose in the clause for a renewal, also made application therefor, and whilst his application was pending on September 15, 1857, Hagne sent into the board a remonstrance in writing against the granting of a renewal to him, setting forth his own claims as assignee and again asking for a renewal to himself. In fulfilment of their covenant for renewal, (as they supposed and intended,) the board on December 1, 1857, executed the lease to plaintiff Blackmore upon which this suit is founded for a portion of the premises, and for the residue thereof executed leases to other parties holding or claiming under plaintiff. Said leases are dated December 1, 1857, and are for ten years from October 15, 1857, with like covenants of perpetual renewal.

“Three questions arose upon the trial, which are the only ones now submitted to the court; all others, whether consisting of defects or errors of pleading or of practice on either side, being hereby expressly waived. The first is, whether the covenant contained in said lease to Blackmore, being a covenant for perpetual renewal, is legal? Second, whether the right of renewal was acquired by Lewis under the sheriff's levy, sale and deed? Third, whether the evidence given by defendant and which was objected to by plaintiff, touching Hagne's notice of application for a renewal, was legal and competent?

“The sheriff's notice accompanying the deed is as follows:

Blackmore v. Boardman.

‘By virtue, &c., I have levied upon and seized the following described real estate as the property of the said William Blackmore, to-wit: the unexpired term of a lease for ten years, made October²⁵, 1847, to said Blackmore by the board of President and Directors of the St. Louis Public Schools on the following described real estate, to-wit [describing the tract of six arpens as in the lease]; said lease is recorded in book No. 4, page 254, of the records of St. Louis county, and is on the same property on which Blackmore now lives, with brick house and appurtenances. And I will, on, &c., at, &c., sell at public vendue, for cash, to the highest bidder, all the right, title, interest, claim, estate and property of the above named William Blackmore of, in and to the above described property, to satisfy said execution and costs.’ The sheriff’s deed recites the levy in the same words, with the same description and reference to the lease as above; states that, agreeably to said advertisement, he (the said sheriff) exposed to sale ‘all the right, title, claim, interest and property of the said William Blackmore of, in and to the above described real estate, together with all the rights, privileges and appurtenances thereunto belonging;’ and the conveyance to Lewis, the purchaser, is in the same words above recited: ‘of all the right, title, interest, claim, estate and property of the said William Blackmore of, in and to the above mentioned and described property that I might sell as sheriff as aforesaid by virtue of the aforesaid writs and advertisement.’

“The plaintiff asked the following instructions: ‘1. A declaration of a member of the board not produced as a witness, though now dead, that the application of defendant for a renewal had been received by the secretary, is not evidence that the board had received defendant’s application. 2. The privilege of renewing the lease did not pass by the sheriff’s sale to his vendee, and has never vested in the defendant according to the law of the case arising on the sheriff’s levy and advertisement and sale and other proceedings and the deed from the sheriff’s vendee to Hagne. 3. Unless the de-

Blackmore v. Boardman.

defendant applied to the schoolboard for a renewal of the lease three months prior to October 15, 1857, his right to such renewal is gone.' The third instruction was given; the second was refused; and the first was modified by the court so as to read as follows: 'The delivery of an application for a renewal to a young man in the office of the board three months before October 15, 1857, who was not one of the board and who is not shown to have had any agency in its behalf, is not proof of a delivery to the board, though accompanied with instructions to deliver the application to the board, unless said application for a renewal was received by the board, or came to their knowledge three months before October 15, 1857.' The plaintiff duly excepted to the refusal to give the first and second instructions, and to the modification by the court of the first instruction. The court also gave the following instruction at the instance of the defendant: 'The deeds from the sheriff to Lewis and from Lewis to Hagne, respectively, carried with them the covenant for renewal contained in the original lease from the board of Public Schools to Blackmore, dated in 1847.'

"The court rendered judgment for the defendant. Plaintiff in due time moved for a new trial, which being again overruled, he again excepted and appealed to this court."

R. S. Hart and Glover, for appellant.

I. A covenant for perpetual renewal is not favored. (14 Kent, 199; 4 Bac. Abr. 890 U.) It is capable of severance from the land so as to abide with the lessee after a sale of the current term. The question whether there is such a severance depends upon the intention of the parties. (1 Smith L. Cas.; Spencer's Case, —; Comyn on Land. & Ten. 61, 157, 159; Smith, L. & Ten. 372; 1 Platt on Leases, 703; 2 Bac. Abr. 352.) The covenant of renewal is not referred to in the sheriff's advertisement, as being the subject of his intended sale; it was neither levied on nor sold. (20 Ohio, 408; 2 Ohio, State, 44.) The rule *caveat emptor* applies in all its rigor to judicial sales. The privilege of re-

Blackmore v. Boardman.

newal in this case was of more value than "the unexpired term." It was not alluded to in the advertisement. It did not pass to the purchaser. Hagne forfeited his privilege of renewal, even supposing it to have passed by the sale. The renewal to Blackmore does not enure to Hagne, his application not being shown to have been made in time, the testimony relied on to prove it not being legal.

Hamilton and H. N. Hart, for respondent.

I. Covenants for perpetual renewal are valid when clearly expressed. (*Brown v. Tighe*, 2 Cl. & Fin. 416; *Smith L. & Ten.* 234; 1 *Platt on Leases*, 708; 4 *Jarman Convey.* 394; *Furlong's Land. & Ten.* 245, 258; 4 *Kent*, 108; 1 *Hilliard on Real Pro.* 227; *Coote on L. & Ten.* 228.) The right of renewal constitutes a part of the tenant's interest in the land, and the grant of the additional term for many purposes is considered as a continuation of the former lease. Whoever takes the lease takes also the renewal. The benefit, running with the land, is transmitted to the assignee, whether he be such by the act of the party or by the law. Here the terms are express to the assignee. The renewal therefore necessarily passed to the person for the time being entitled to the lease. (12 *East*, 467; 1 *Platt on Leases*, 733; 2 *id.* 419; *Furlong's Land. & Ten.* 533; 4 *Bing., N. C.* 780; *Spencer's case*, 5 *Co.* 16; 4 *Kent*, 108; 4 *Jarm. Conv.* 425; *Smith Land. & Ten.* 147; 5 *B. & A.* 11; *Anon. Moore*, 159; 13 *Ired.* 194; 1 *Dev. & Bat.* 94; 3 *Metc.* 85; 1 *N. & McCord*, 104; *Woodfall, L. & T.* 86; *Coote*, 230.) It was not in the power of the sheriff to sever the covenant from the interest conveyed, nor did he attempt it. His deed passed all the interest and estate of the lessee in the property described in the notice of sale. It is not necessary for the sheriff, in his deed assigning a term, to state the particular interest the party has; he may convey by general words. (*Palmer's Case*, 4 *Co.* 74; 3 *T. R.* 292; *Eaton v. Southby, Willis*, 138; *Watson on Sheriff*, 128.) The word "term" means not only the limitation of time but the estate and in-

terest also. (Co. Litt. 45 *b.*; Comyn on L. & T. 5; Burton on Real Prop. 124; Draper v. Bryson, 17 Mo. 84.) The evidence as to official acknowledgment of the deceased secretary was properly admitted in evidence.

RICHARDSON, Judge, delivered the opinion of the court.

The numerous authorities cited by the defendant's counsel establish in his favor the first two propositions presented in the statement. As the law discourages perpetuities, it does not favor covenants for continued renewals; but, when they are clearly made, their binding obligation is recognized and will be enforced. The covenant for renewal is only an incident to the lease, and as it can not be passed without the principal, the conveyance of the principal by a proper description will necessarily carry the incident. They are inseparable, and a right of action can not exist in favor of a person claiming the benefit of the covenant without any right to the possession of the leasehold; but the covenant, being annexed to the estate, runs with it, and can not be retained by itself or assigned or severed so as to give an independent cause of action. A sale of the land under execution will pass to the purchaser all the covenants that run with it as effectually as if he had received a conveyance from the lessee; for as the purchaser, after he acquires possession, is bound to pay the rent and in that way assumes the burdens of the lease, he has the right to take advantage of the covenants that touch and concern the thing demised, which enhance the value of the estate.

The parties agree that the application for renewal was in proper form, and, as the minutes of the board of directors show that the notice was before the board on the 11th of August, at the second meeting held after it had been left by Kurlbaum, we think his evidence was properly received. Notice left with a man about the office who had no authority to receive it of course would not bind the Public Schools, but, as the directors are not supposed to be all the time in session,

Bowlin v. Furman.

it would seem that the secretary was the proper person with whom such applications should be left. It would be gross neglect in the defendant if he had left the notice with a chance man about the office, and had not returned again to inquire whether it had been received ; but the agent was told by the secretary a few days afterwards, and in ample time to have given another notice, that it had been received, and under such circumstances it would be a fraud on him to hold that he had lost his rights by his negligence. The parties have requested that the controversy between them shall be determined in this court in view of all the equities of the case, and, as the admission of the deceased secretary would certainly be competent in a proceeding by the defendant against the board of Public Schools to have specified performance of the covenant for renewal, we have less hesitation in deciding that the evidence was admissible in this suit. The other judges concurring, the judgment will be affirmed.



BOWLIN, Plaintiff in Error, v. FURMAN, Defendant in Error.

1. Under the act of incorporation of March 1, 1851, (Sess. Acts, 1851, p. 139,) the city of Carondelet had power to sell and dispose of its school lands ; the purchaser was under no obligation to see to the application of the purchase money. She might convey a portion of her school lands in exchange for and by way of compromise of an adverse claim to land embraced within her survey of common. Third persons could not dispute the validity of such an exchange on the ground that Carondelet had thereby committed a breach of its obligation to appropriate the school lands and their proceeds to the use of schools.
2. A conveyance by Carondelet by quit-claim deed of a portion of its school lands is valid and operative although at the date thereof there was no survey or assignment by the United States for the use of schools ; to sustain a conveyance made before such assignment it is not necessary to invoke the doctrine of the enurement of after acquired titles.

Error to St. Louis Land Court.

This was an action in the nature of an action of ejectment to recover possession of four arpens of land, being a part of

United States survey No. 124, in the common field of Carondelet. The land embraced by said survey No. 124 was assigned to Carondelet for the support of schools November 14, 1853. The land afterwards embraced in said survey No. 124, being a tract of one by forty arpens, was on the 18th of November, 1851, conveyed by the city of Carondelet to Louisa Franklin and Constance Shultz, under whom plaintiff claims title. This conveyance on its face purported to have been made by way of compromise of a claim of said grantees, as the legal representatives of Gabriel Constant, to a tract of two hundred arpens in the common of Carondelet, which had previously been leased and disposed of by Carondelet for her benefit. Said deed was a quit-claim deed. The court gave the following instruction at the instance of the defendant: "1. Although the jury may find from the evidence that the premises in question are situated within the outboundary of the town of Carondelet shown by the survey and report of the surveyor general given in evidence, and although the said premises may have been set apart by said surveyor to the inhabitants of Carondelet for the support of schools, yet the ordinance of the city of Carondelet dated November 18, 1851, and the deed purporting to have been made by the city of Carondelet of the same date, and the deed of Franklin and wife and Shultz and wife read in evidence, are not sufficient to vest the legal title of said premises in the plaintiff; and the jury should find for the defendant."

The court refused the request of the plaintiff to instruct as follows: "1. If the jury believe from the evidence that the lot of ground sued for in this action is within United States survey No. 124, given in evidence by plaintiff, and that said lot of ground is included within the tract of land described in the deed of the city of Carondelet to Louisa Franklin and Constance Shultz, and also within that described in the deed of Franklin and Shultz and their wives to plaintiff, both given in evidence by plaintiff; that all the documents given in evidence by plaintiff are genuine, and that the tract of land surveyed as survey No. 124 is within the outboundary

Bowlin v. Furman.

of the town of Carondelet given in evidence by plaintiff, then the plaintiff has established a perfect legal title to the premises in controversy; and, in order to defeat that title and prevent the plaintiff from recovering in this action, the defendant must have proved to the satisfaction of the jury, not only that the land sued for in this action, or some part of a larger tract of which it formed a part, was inhabited, cultivated and possessed prior to the 20th day of December, 1803, but must also show by whom it was cultivated prior to said time, and that such person or persons inhabited, cultivated or possessed the said lot, or the larger tract of which it formed a part, under some right, title or claim thereto in their own right, and that such right, title or claim continued in such person or persons and their legal representatives from the 20th day of December, 1803, to the time of the passage of the act of Congress of June 13, 1812. 2. If the jury believe from the evidence that the premises in controversy, or the tract of which it formed a part, was inhabited, cultivated or possessed by some one prior to the 20th day of December, 1803, but there is no evidence satisfactory to them of who that person was, then the jury are instructed that there is no sufficient evidence of any confirmation of the land in controversy under or by virtue of the act of the 12th of June, 1812, of the Congress of the United States."

The plaintiff took a nonsuit, with leave, &c.

Shepley, Wright and Casselberry, for plaintiff in error.

I. The city of Carondelet has full and absolute power of dominion and disposition of all property vested in the corporation. The power of disposition over the common and the school lands is entirely unrestrained. It is only of the *proceeds* of the one-tenth of the sales of the common and the whole of the sales of the school lands that a particular disposition is made, that it shall be held for the support of schools. Carondelet did not hold these lands strictly as trustee, but as absolute proprietor, clothed, to be sure, with the obligation to appropriate them or the proceeds to the support of schools.

The exchange of lands was a sale within the meaning of the act. Even if the city holds as trustee, the purchaser is not bound to look to the proper application of the proceeds. The city conveyed its legal title to those under whom plaintiff claims. (*Gales v. Manning*, 20 Mo. 461.) It is no objection that the assignment to the schools was subsequent to the conveyance by Carondelet. The title of Carondelet was perfect at the time of the conveyance. The deed was sufficient to carry the land. (*Kissell v. Public Schools*, 18 How. 215; *Landes v. Brant*, 10 How. 348.) The question whether a subsequently acquired title enures under a quit-claim deed has no application to this case. Carondelet had title at the time of the conveyance.

Krum & Harding, for defendant in error.

1. The deed from Carondelet was a mere quit-claim. The subsequent assignment for the use of schools did not enure to the benefit of the grantees in the deed. (*Bogy v. Shoab*, 13 Mo. 365.) The deed from Carondelet to Franklin and Shultz was void. The city had no power to barter the school lands for the benefit and use of the corporation. No powers will be inferred to enable a trustee to violate his trust. The deed is void for fraud patent upon its face. The intention to convert the trust fund for the benefit of the trustee is apparent upon the face of the deed. Can the grantees in such a deed claim that they are not bound to see to the application of the proceeds of the sale, or even that they have acquired the *legal* title and hold themselves liable to account to the beneficiaries?

SCOTT, Judge, delivered the opinion of the court.

This is an action of ejectment, and the pleadings present nothing but the dry point, whether there was authority in the city of Carondelet to make the conveyance of the land in dispute through which the plaintiff claims. The record does not raise the question whether those, under whom the defendant holds, had title, under the act of 13th June, 1812, by

virtue of inhabitation, cultivation or possession prior to the 20th December, 1803.

The first clause of the second section of the eighth article of the act incorporating the city of Carondelet enacts, that the property in all lands granted, for the benefit of schools, to the inhabitants of the town or village of Carondelet by any act of the Congress of the United States, is hereby vested in the corporation created by this act. The following clauses do not seem to be designed to restrict the grant, but are only directions for the management of the property conferred by the act on the city. (Sess. Acts, 1851, p. 148.) An objection of the defendant is, that the conveyance made by the city was not a sale, but an exchange which it had no authority to make. By its charter, the city had authority to take all measures necessary to obtain possession of the school lands, whether by action at law or compromise with adverse parties. The school land exchanged was not in possession of the city; it was in dispute, as this suit shows. The party with whom the exchange was made claimed a tract situated in the commons of Carondelet. The city, then, compromised a claim to a portion of her commons by conveying a lot of the school lands in satisfaction of it. The charter provided that one-tenth part of the proceeds of any sales of the common should be paid over to the school fund of said city and be applied to the use of schools therein. It may be said that the portion of the commons claimed had been leased and disposed of before the city was incorporated, so that there could be no sales in which the schools could have an interest. To this it may be answered that there was a power of granting in fee the lands leased, and the tenth part of the profits arising from this source may have been worth as much or more than the claim of the schools to the lot in controversy. This transaction, then, might be referred to the power to compromise as the source of the authority which gave a warrant to its existence. The act of Congress of Jan'y 27, 1831, vested the legal title to the school lots reserved by the act of the 13th June, 1812, in the state, to be sold or disposed of or

Bowlin v. Furman.

regulated for school purposes in such manner as might be directed by the legislature. The state granted the full property in these lands to the city of Carondelet for the benefit of schools, with directions to compromise disputed titles and to make sales, applying the proceeds to the purposes of the grant. The power of establishing, regulating and supporting common schools was vested in the council by the charter; so that the corporation was as well one for school purposes as for municipal regulation. Powers so extensive would sanction the exchange made between the city and the vendors of the plaintiff. Under the circumstances there was no duty [imposed] on the purchaser to see to the application of the purchase money or to inquire whether the trustee was guilty of a breach of trust. Had the city exchanged a portion of the school lands not suitable as a site for a school-house for a lot adapted to that purpose, the title would certainly have passed. We are not inquiring whether Carondelet has been guilty of a breach of trust for which she may be liable; for such an hypothesis is not at all inconsistent with the idea that the power to pass the title existed. The legal title to the lot was beyond all controversy in the city; she was a trustee; and it can not be questioned that the deed of a trustee conveys a legal title. The trustee having a legal, though defeasible, title, that title becomes absolute in his vendee in a court of law. In a court of law, the vendee need not show that the conditions of the trust deed have been complied with. (*Gale v. Mensing*, 20 Mo. 461; *Taylor v. King*, 6 Munf. 366.) Although there is now no distinction between courts of law and equity, yet if a party under the present system will file a petition which formerly only entitled him to a legal remedy, he can not now under such a petition have any other than the remedy he formerly had. If he would have equitable relief, he must set out in his pleading the facts which give him title to it. The pleadings in the present action are only designed to try the mere legal title, and therefore that is the only matter we are called upon to decide, and we accordingly speak of it as an action at law.

Bowlin v. Furman.

Another argument of the defendant is, that the deed is void for fraud patent upon the face of it, because it shows that a trustee is attempting to convert a trust estate to his own use and declares his intention upon the face of the deed ; and he further maintains that the grantees in the deed are bound to see to the application of the purchase money and to hold themselves liable to account to the beneficiaries. This argument proceeds certainly on the ground that the title passed from the city to her alienees. No fraud by way of breach of trust and confidence can have been committed by the city unless she has passed away the title granted to her by the general assembly. If no title has passed, the beneficiaries of the trust are not injured. But if there is a breach of trust and a fraud has been committed, then the title must have passed ; and if a title has passed, it is obvious that the plaintiff must recover in this action, as the right to the strict legal title is the only matter in issue by the pleadings. If the city has been guilty of a breach of confidence in conveying away a trust estate ; if the plaintiff has been guilty of a fraud in accepting a title under it, that is a matter not to be determined in this suit, nor in a suit to which the defendant is a party. If Carondelet has betrayed and defrauded those who confided in her, that is no concern of the defendant. Let those complain who are injured. A deed may be fraudulent and void, but it is not for strangers to complain of it. A deed that is fraudulent can only be avoided by those who are injuriously affected by it. If a breach of trust has been committed in aliening this land, the defendant is no more affected by it than any other member of the community.

It was insisted by the defendant that the deed under which the plaintiff claims was executed before the school lands therein described and attempted to be conveyed were assigned and set apart for the use of schools, consequently there was no title in Carondelet at the date of the deed, and therefore none could pass by the deed of the vendors of the plaintiff. In the case of *Kissell v. The Public Schools*, 18 How. 215, the supreme court of the United States expressed the

Gutzweiler v. Lachman.

opinion that the school lands were in the condition of Spanish claims after confirmation, without having established and conclusive boundaries made by public authority, and which claims depended for their specific identity on surveys to be executed by the government. If the school lands were in the condition of confirmed Spanish grants before a survey, surely no question can arise as to the right to dispose of them, and that a disposition of them in that state would carry any title the government would afterwards pass. The deed would convey the land, and the subsequent designation, like the survey of a confirmed grant, would point out the land designated. The doctrine of the enurement of a title acquired after the making of a conveyance is not applicable to the circumstances of this case.

Reversed and remanded ; the other judges concur.

GUTZWEILER, Respondent, v. LACHMAN *et al.*, Appellants.

1. Where property is designed for the benefit of creditors, and a sale is made by the trustee under such assignment, the fact, that a purchaser at such sale purchases the property for the benefit of the grantor in the deed of trust and with a view to permit him to enjoy the benefit of it, will not render the transaction void as to creditors ; nor would it be rendered void by the fact that the purchase was made with the understanding that the grantor should have the privilege of redeeming on payment of the sum advanced. It would be otherwise if the purchase had been made with money furnished by the grantor in the deed of trust.
2. In an action of ejectment for the recovery of leasehold premises, the plaintiff can not recover by way of damages the rents and profits beyond the time of the expiration of his title.

Appeal from St. Louis Land Court.

This cause has heretofore been before the supreme court. (See *Gutzweiler v. Lachman*, 23 Mo. 168.) It was an action in the nature of an action of ejectment, commenced September 16, 1854, to recover possession of certain leasehold premises in the city of St. Louis. Plaintiff claimed title by vir-

Gutzweiler v. Lachman.

tue of a deed of conveyance dated May 17, 1853, executed by one Thomas J. Meier as trustee for one John T. Schultze. The defendant Garesché, who defended as the landlord of the other defendants, claimed title by virtue of a sale on execution under a judgment, dated April 22, 1852, against the said John T. Schultze and one Henry Mauck, and a deed from the sheriff, dated September 29, 1853; and also set up that the deed of trust to Meier and the deed of Meier to plaintiff were void as to the creditors of Schultze. The lease to Schultze was for ten years from September 1, 1845. The lessor agreed to pay to the lessee the value of the improvements at the expiration of the term, or to renew the lease at the option of the lessee. There was evidence tending to show that plaintiff purchased the property at the trustee's sale for the benefit of Schultze.

The court gave the following instruction at the instance of the plaintiff: "1. If the jury shall believe from the evidence that the property in dispute was purchased at the trustee's sale by the plaintiff for his own individual account, and that the money which was paid for the same was the money of the plaintiff, then they ought to find for the plaintiff." The court, of its own motion, instructed the jury as follows: "2. If the jury find for the plaintiff, they will assess the amount of the damages the plaintiff has suffered, and the measure of damages is the value of the rents and profits of the premises sued for during all the time the defendants have held the possession against the plaintiff to this day; and the jury will find in addition and separately the monthly value of the rents and profits of the premises. 3. The deed from Meier (the trustee) to the plaintiff being fair and regular on its face, it devolves on the defendants, who attack it, to establish by evidence satisfactory to the jury, either that the plaintiff (Gutzweiler) bought the property for the use and benefit of Schultze, or that the purchase money or part of it was paid out of the means of Schultze; and unless the jury are satisfied that the defendants have established one or more of these

Gutzweiler v. Lachman.

facts, the deed must stand and the defendants must fail in their defence." The court refused the following instructions asked by defendants: "1. If the jury believe from the evidence that the property was bought by Gutzweiler, the plaintiff, with his own means, but with the understanding with Schultze that it was to be repaid to him by Schultze, then the property was bought for Schultze by Gutzweiler, and the jury must find for the defendants. 2. If the jury believe from the evidence in the cause that Gutzweiler purchased the property in dispute at the sale made by Meier, the trustee, for the benefit and use of Schultze, the plaintiff is not entitled to recover. 3. If the purchase money bid by Gutzweiler at the sale by Meier as trustee, or any part thereof, was paid by Schultze or with his means, the plaintiff can not recover."

The jury found for plaintiff and assessed his damages at the sum of \$2,808, and fixed the monthly value at fifty dollars. A motion for a new trial and affidavits were filed in support thereof. It is deemed unnecessary to set them forth. They were filed with a view to show that defendants had been *surprised* by the verdict for damages.

S. T. & A. D. Glover, for appellants.

I. The plaintiff showed no legal title at the time of the trial. The lease, supposing plaintiff's right to it was not void, had expired September 1, 1855. The court erred in refusing the instructions asked by defendants. The property was evidently bought by Gutzweiler with Schultze's means. The court instructed the jury erroneously. The instruction as to the measure of damages was erroneous. No allowance was to be made for taxes, insurance, repairs and other charges imposed upon the lessee. The damages were excessive; they were obtained by a surprise. The affidavits show this. Damages should not be computed against defendants after the expiration of the lease.

H. N. Hart, for respondent.

SCOTT, Judge, delivered the opinion of the court.

This was an action of ejectment to recover possession of leasehold premises. The fact that the plaintiff purchased the property intending that Schultze should have it, would not make the sale void as to Schultze's creditors. One has a right to purchase the property of another and hold it for his benefit or permit him to enjoy the benefit of it. Such conduct can in nowise prejudice creditors; nor is the case altered by purchasing with the understanding that the debtor shall have the privilege of redeeming on payment of the sum advanced. Such a transaction would at most amount to a mortgage, and the creditors would not be allowed to come in but upon first satisfying it. We see no error in the giving or refusing instructions on these points. No doubt if the money, with which the plaintiff purchased the property, was furnished by Schultze, his right to a recovery, upon the proper establishment of that fact, would be taken away.

We are of the opinion that there was error in the instruction given as to the measure of the damages. The jury were instructed that the measure of damages was the value of the rents and profits of the premises sued for during all the time the defendants have held the possession against the plaintiff to this day. Now the lease in evidence showed that it had expired before the trial. The statute says, if the plaintiff prevail in the action, he shall recover damages for all waste and injury, and by way of damages the rents and profits down to the time of assessing the same, or to the time of the expiration of the plaintiff's title. On the evidence in the case, this instruction was clearly erroneous. Even on the instruction as given, the damages were excessive, the annual rent of the premises being seven hundred dollars and the lease showing that from this sum deductions were to be made.

The affidavits accompanying the motion for new trial showed a very hard case against the defendant Garesché, who in this whole matter manifested that he was willing to do

what was right. But we do not deem it necessary to go into these matters as the judgment will be reversed on the other ground. The affidavits clearly showed that the damages as against Garesché were excessive, for it is not seen how he was made responsible for them after the expiration of the lease.

Reversed and remanded; the other judges concurring.

GARNIER, Plaintiff in Error, v. BARRY, Defendant in Error.

1. The proviso of the act of June 22, 1821, (1 Terr. Laws, 756,) to the effect that nothing therein contained should "in anywise authorize husband and wife to convey [any] estate granted to the wife and heirs after intermarriage" does not apply to a confirmation, by the act of Congress of June 13, 1812, of a Spanish concession or claim cast upon the wife by descent previous to her marriage; nor does said proviso apply to the case of an inheritance by a wife during marriage of such a confirmation; husband and wife might, under said act of June 22, 1821, convey land thus confirmed to the wife during marriage, or thus falling to her by inheritance.
2. The second section of the act of December 6, 1821, (1 Terr. Laws, 798,) was applicable to a conveyance by husband and wife of the latter's real estate under the act of June 22, 1821; consequently, such a conveyance was not entitled to be admitted to record unless the certificate of acknowledgment contained the requisites prescribed by the said second section of the act of December 6, 1821. It was necessary that the certificate should state that the persons making the acknowledgment were personally known to the person taking the same, or were proved by two credible witnesses, whose names were mentioned therein, to be the proper persons who made and executed the deed.
3. The fifty-eighth section of the act concerning evidence (R. C. 1855, p. 733) is not, it seems, applicable to the case of the record of a deed defectively acknowledged; a certified copy of the record of such a deed and of the time of its record, though accompanied with proof of claim and enjoyment under such deed for ten consecutive years, would not, under said section, be *prima facie* evidence of its execution and genuineness.
4. A. and B., husband and wife, on the 10th of December, 1823, executed a conveyance of land belonging to the wife. The acknowledgment was taken on the same day before a county court, which was composed of at least three judges, and certificate thereof was in the following form: "Be it remembered, that on, &c., appeared in open court A. and B., his wife, and acknowledged the foregoing deed of conveyance from them to L. A. B. to be their voluntary act and deed for the purposes therein expressed; she, the

Garnier v. Barry.

said B., being privily and apart from her said husband examined, declared that she did freely and willingly seal and deliver the said writing and wished not to retract, and she being previously made acquainted with the contents thereof." This acknowledgment was attested by the presiding justice under the seal of the court. *Held*, that this acknowledgment was sufficient to pass the title of the wife under the act of June 22, 1821; (1 Terr. Laws, p. 756;) the certificate of acknowledgment was not, however, sufficiently in conformity to the second section of the act of December 6, 1821, (*id.* p. 798,) to authorize its admission to record.

5. The act of February 14, 1825, (R. C. 1825, p. 220, § 12,) regulating conveyances, required a married woman, making an acknowledgment of a deed of conveyance of her estate, to "appear before some court of record." In a certificate of acknowledgment taken before a judge of a probate court, and certified by him, he having no clerk, it was stated as follows: "At a term of the probate court for, &c., before me, M. P. L., judge of said court, personally appeared M. G., wife, &c., who is personally known," &c. *Held*, that the acknowledgment was good.

Error to St. Louis Land Court.

This is an action in the nature of an action of ejectment to recover possession of an undivided interest of a lot of ground embraced in a larger tract of one by forty arpens situate in the St. Louis common field. Said lot was confirmed by act of Congress of June 13, 1812, to the legal representatives of Auguste Condé. The claim of Condé's representatives was proven up before Recorder Hunt in 1825 under the act of 1824. It was duly surveyed by the United States in 1826. Both parties to this suit claim under Condé. Condé died in 1776, leaving two daughters his only surviving issue. In 1779 one of said daughters intermarried with Charles Sanguinette, and in 1797 the other intermarried with Patrick Lee. Charles Sanguinette died in 1818, and Mrs. Sanguinette in 1821, leaving nine children then surviving, of whom were Mary, (the plaintiff in this action,) who was born in 1781, and married in 1812 Joseph V. Garnier, who died in 1851; Caroline, who intermarried in 1818 with Horatio Cozens, and became discovert by his death in 1826; Adelle, who intermarried with John E. Tholozon in 1819, and Charles. Patrick Lee and wife both died in 1825, leaving six children:—Lydia, who intermarried in 1818 with Stephen

Rector and became discoverd by his death in 1826; Constance A., who intermarried with Zalmon Palmer; Emily Rousseau; Ellen Rappernich; Sophia O'Fallon, and Oscar.

Plaintiff read in evidence a deed dated October 29, 1847, of Charles Sanguinette, Caroline Cozens, John E. Tholozon and Adelle his wife, and Lydia M. Rector, to Marie Garnier, the plaintiff, acknowledged about the same time and recorded in St. Louis county in April, 1850. Plaintiff also read in evidence a deed from Rousseau and Emily his wife to herself, dated and acknowledged December 28, 1847, and recorded in March, 1850; also a deed from Constance A. Palmer, Sophia O'Fallon and Ellen Rappernich to herself, dated, acknowledged and recorded in March, 1850.

The defendant offered in evidence a certified copy of the record in the recorder's office in St. Louis county, of a deed of conveyance purporting to be executed by Patrick Lee and Constance his wife, conveying to Louis A. Benoist an undivided half of a lot of one by forty arpens granted to Auguste Condé. This deed was dated December 10, 1823, and was accompanied by the following certificate of acknowledgment: "State of Missouri, county of St. Charles, ss. County court—December term, 1823. Be it remembered, that on this 10th day of December, 1823, appeared in open court Patrick Lee and Constance Lee his wife, and acknowledged the foregoing deed of conveyance from them to L. A. Benoist to be their voluntary act and deed for the purposes therein expressed. She, the said Constance, being privily and apart from her said husband examined, declared that she did freely and willingly seal and deliver the said writing and wished not to retract it, and she being previously made acquainted with the contents thereof. In testimony whereof, I, Robert Spencer, presiding justice of said court, have hereunto set my hand and caused the seal of said court to be affixed. [Signed] Robert Spencer, P. J. C. C. C. St. C. [Seal.] In testimony whereof, I, William Christy, jr., clerk of the said court, have hereunto set my hand and affixed my private seal, there being no seal of the court yet provided. William

Christy, jr." From the accompanying certificate of the recorder of St. Louis county, it appeared that this deed was recorded December 11, 1823. This deed was admitted in evidence against the objections of plaintiff.

The defendant also offered in evidence a certified copy of the record of a deed purporting to have been executed by J. V. Garnier and Marie Garnier his wife, in favor of L. A. Benoist. The deed was dated April 28, 1827, and was recorded September 15, 1830. The certificate of acknowledgment on the part of Mrs. Garnier was as follows: "State of Missouri, county of St. Louis, ss. Be it remembered, that at a term of the probate court for the county and state aforesaid, begun and held at the city of St. Louis, in said county, the 19th day of March, 1827, before me, Mary P. Leduc, judge of said court, personally appeared Marie Garnier, wife of Joseph V. Garnier, who is personally known to me to be the person whose name is subscribed to the foregoing instrument of writing as having executed the same. The contents of the said instrument of writing was made known and explained to her, and she, the said Marie, was examined separately from her husband whether she executed the same voluntarily, freely and without compulsion or undue influence of her husband; and being so examined, she, the said Marie, acknowledged said instrument to be her act and deed, that she executed the same voluntarily, freely and without compulsion or undue influence, and does not wish to retract. [Seal.] In testimony whereof, I, the said judge, have hereunto set my hand and affixed the seal of said court this 28th day of April, 1827. M. P. Leduc, J. Prob." This certified copy of the record was also admitted in evidence against the objections of plaintiff.

The defendant also offered in evidence a deed executed by John E. Tholozon and wife to Laveille and Morton conveying the wife's interest in the land in controversy. This deed was dated November 5, 1830, and was recorded July 25, 1855. There was evidence showing that Mrs. Garnier, the plaintiff, had knowledge of this deed at the time it was

executed. The deed was admitted in evidence against the objections of plaintiff.

The court gave the following instructions at the instance of the defendant: "1. At the date of the respective deeds given in evidence of Joseph V. Garnier and wife and John E. Tholozon and wife to Louis A. Benoist, the said Garnier and wife and the said Tholozon and wife could, by the respective deeds of said parties acknowledged in conformity with the law then in force, convey any interest in the tract in controversy in this suit which the wife of said party derived by descent from her mother. 2. The acknowledgment of Mary Garnier, in the form such as appears upon the paper given in evidence by defendant purporting to be a copy of the deed of Joseph V. Garnier and wife to Louis A. Benoist, is a sufficient compliance, in point of form, with the law in force at the time said acknowledgment purports to have been taken in order to pass any estate, which she then owned, derived from her mother. 3. The jury are instructed that on the 10th day of December, 1823, Patrick Lee and his wife Constance could, by the deed of said parties, acknowledged in conformity to the law then in force, convey any title which is shown by the evidence in this cause to have been in Constance Lee at that date to the land in controversy. 4. The acknowledgment of Constance Lee, in the form such as appears upon the paper purporting to be a copy of a deed of Patrick and Constance Lee to Louis A. Benoist, given in evidence by the defendant, is a sufficient compliance in point of form with the law in force at the time such acknowledgment purports to have been taken, in order to pass any title which is shown by the evidence in this case to have been in Constance Lee at that date to the land in controversy."

The plaintiff asked and the court refused the following instructions: "1. If Auguste Condé died leaving only two children, who were Mrs. Lee and Mrs. Sanguinette, the confirmation aforesaid was a grant of said land to them on the 13th of June, 1812, equally. 2. Upon the death of Mrs. Lee or Mrs. Sanguinette, the moiety of this land to her be-

Garnier v. Barry.

longing, if undisposed of by deed or will, vested in her children or their descendants equally. 3. The paper read in evidence by the defendant, purporting to be a copy of a deed from Patrick Lee and wife to L. A. Benoist of their interest in certain lands, is not operative to convey to the said Benoist any interest of Mrs. Lee in the land confirmed to the legal representatives of Condé in the year 1812. 4. The paper read in evidence, purporting to be a copy of a deed from J. V. Garnier and wife to L. A. Benoist of their interest in certain land, is inoperative to convey any interest of Mrs. Garnier in said land. 5. The deed of J. E. Tholozon and wife to Laveille and Morton is inoperative to convey to the said Laveille and Morton any interest in the said tract of land confirmed to the representatives of Condé, which belonged to Mrs. Tholozon. 6. If the jury find that the deed of John E. Tholozon and wife to Laveille and Morton, read in evidence by defendant, was not recorded till after the making and recording of the deed by Tholozon and wife to plaintiff and by her read in evidence, then the first deed will not avail to defeat the second deed to plaintiff, unless the jury further find that plaintiff had, at the time of the making of said second deed to plaintiff, actual notice of the making and existence of said first deed to Laveille and Morton, and that it had been acknowledged by Mrs. Tholozon and her acknowledgment certified in such manner as to pass the estate of a married woman during marriage. 7. If the jury find that the deed from John E. Tholozon and wife to Laveille and Morton, read in evidence by defendant, was withheld from record for many years and for a long time after the making and recording of the deed of said Tholozon and wife to plaintiff and by her read in evidence, then such withholding from record is evidence of fraud, and plaintiff, even if aware of the existence of the said deed to Laveille and Morton at or about the time of the making thereof, had a right to presume that it had been cancelled, or the estate, which was thereby granted, had been revested in the said Tholozon and wife. 8. The paper read in evidence by defendant and purporting

to be a copy of a deed from Patrick Lee and wife to L. A. Benoist does not imply that any such original deed had been acknowledged and certified so as to have authorized the recording thereof, and therefore is not evidence of the fact that there ever was any such original deed. 9. The paper read in evidence by defendant, purporting to be a copy of a deed from Joseph V. Garnier and wife to L. A. Benoist, does not imply that any such original deed had been acknowledged and certified so as to have authorized the recording thereof, and therefore is not evidence of the fact that there ever was any such original deed."

The plaintiff took a nonsuit, with leave, &c.

Gantt, for appellant.

I. The land in controversy vested in Mrs. Lee during coverture by virtue of the confirmation. Prior to the confirmation Condé's representatives had no estate of which a court of justice could take cognizance. At best they had a mere claim upon the bounty of the government. The proviso of the act of June 22, 1821, is applicable. Besides, the certificate of acknowledgment is defective. (See *Strother v. Lucas*, 13 Pet. 453; *Le Bois v. Brammell*, 4 How. —; 1 Terr. Laws, 756, 798.) The acknowledgment of the deed under which defendant claims the interest of Mrs. Garnier is imperfect. (R. C. 1825, p. 220; *Elliott v. Piersol*, 1 Pet. C. C. 328.) The deed of Mrs. Lee was admitted to record against law, and therefore in any legal sense it was not recorded at all. It is not therefore within section fifty-eight of the act concerning evidence. (R. C. 1855, p. 773.) There is no authentic copy of the deed in evidence. The court erred in refusing the instructions asked by plaintiff, and in giving those asked by defendant.

Shepley, for respondent.

I. The deed of Lee and wife was sufficient to pass any title that she might have in the land. The proviso of the act of June 22, 1821, does not apply to land held and acquired as Mrs. Lee held and acquired the land in controversy.

Garnier v. Barry.

The deed was good under said act. Besides, it was sufficient to convey the estate of the wife independently of said act. Her interest in the land was under the Spanish law paraphernal. (Lindell v. McNair, 4 Mo. 380; Boyle v. Meegan, 19 How. 130.) The acknowledgment was sufficient. It was competent to use a copy of the record in evidence. Besides, it was proved by Benoist that the copy offered in evidence was a copy of the deed made to him. It was also properly admitted in evidence under the fifty-eighth section of the act concerning evidence. (R. C. 1855, p. 773.) The deed of Mrs. Garnier and her husband was competent to pass any right she had in the premises. It sufficiently appears from the acknowledgment that it was made in open court. The instruction asked by plaintiff in relation to the interest of Mrs. Tholozon was properly refused; so also the others.

Scott, Judge, delivered the opinion of the court.

Prior to the act of June 22, 1821, (1 Terr. Laws, p. 757,) there was no statute in this state which authorized the conveyance of her real estate by a married woman. That act prescribed a mode by which the husband and wife might dispose of the wife's land, with a proviso that it should not authorize in anywise husband and wife to convey any estate granted to the wife and heirs after intermarriage. The land in controversy was an interest in a village lot of St. Louis of one by forty arpens, the right to which was proved before the recorder of land titles in the name of the legal representatives of Auguste Condé under the act of Congress of 26th May, 1824. Auguste Condé died in 1776 leaving two daughters, Mary and Constance. Constance intermarried with Patrick Lee on the 18th July, 1797, and they, on the 10th day of December, 1823, conveyed to L. A. Benoist one-half of the arpent of one by forty arpens described as being the north half of a tract of land granted to Auguste Condé, as appeared by *livre terrien* No. 2, p. 27. The tract described included the lot which is the subject of this controversy.

The principal question in this case is whether, under the foregoing state of facts, the deed of Patrick and Constance Lee was effectual to convey the interest of Constance Lee, the wife. It was maintained on the part of the plaintiff that Patrick and Constance Lee having been married in 1797, and the land being confirmed to the legal representatives of A. Condé, her ancestor, by the act of the 13th June, 1812, the title then passing from the United States, they could not, on the 10th of December, 1823, the date of their deed to Benoist, alien the land, as it was conveyed to the wife and her heirs during the marriage, and therefore was by force of the proviso therein contained excepted from the operation of the act of 22d June, 1821.

The proviso in the act of 1821, which imposed a partial restriction on the right of the wife to alienate her property, was not in accordance with the principles of the common law and did not receive much countenance, as we find that it was repealed by an act passed the 16th January, 1833, and has never since been restored to our code. Under such circumstances there is no reason in justice nor policy which will warrant its receiving any other construction than that which its language will fairly warrant. It is true that on a Spanish title not complete before the change of government, a party had no standing in a court of justice, except so far as it was given to him by the legislation of the general or state government; and, except he had such aid, he could maintain no action for the enforcement of this unconfirmed grant or concession in any court, state or federal; nor could he maintain any action in which the title to the land was involved, for, as in all such cases the ultimate title was in the United States, it was useless to litigate respecting it before its emanation. But, notwithstanding this, it is well known that incomplete Spanish grants were as much regarded as property as real estate with a perfect title, in all contracts, and under the administration and execution laws, and also under the law of wills, descents and distributions. In the case of *Landes v. Perkins*, 12 Mo. 259, it was said that "it is a matter

Garnier v. Barry.

of history, of which this court will take judicial notice, that at the time of the cession of Louisiana to the United States, in that portion of the territory of which this state is composed, nineteen-twentieths (there were but two or three exceptions) of the titles to land were like that involved in this case prior to its confirmation. There were very few complete grants. Most of the inhabitants were too poor to defray the expenses attending the completion of their titles, but they had faith in their government and rested as quietly under their inchoate titles as though they had been perfect. (Stoddart's Sketches, 245.) As early as October, 1804, we find the legislature speaking of freeholders, and authorizing executions against lands and tenements. See the law establishing courts for the trial of small causes passed October, 1804. (Sec. 10.) There being so few complete titles, the legislature, in subjecting lands and tenements generally to execution, must have contemplated a seizure and sale of those incomplete titles which existed under the Spanish government. At the date of the act above referred to no titles had been confirmed by the United States. An instance is not recollected in which a question has been made as to the liability of such titles as Clamorgan's under the Spanish government to sale under execution. It is believed that such titles have been made the subject of judicial sales without question ever since the change of government." (Papin v. Massey, 27 Mo. 452.) Clamorgan's title was an unconfirmed Spanish concession. The plaintiff, who would make it appear that there was no title or property in the land until the confirmation by the act of the 13th June, 1812, yet claims this very property by virtue of an inheritance which was cast in 1776. That descent made Constance Condé a legal representative within the meaning of the act of the 13th June, 1812, and had she conveyed the title that came to her by descent from her father, her alienee would have been the legal representative.

These considerations we deem sufficient to show that, although for some purposes unconfirmed grants could not be

used as real estate with a legal title, yet for many practical purposes such claims were regarded as property among the people, and by the state laws and in the way of contract they had all the attributes of real estate with a perfect title. We do not therefore see any ground on which it can be maintained that the land in suit was an estate granted during the intermarriage. For all substantial purposes the estate was in the wife before the marriage. Before she became a wife she could have secured that land to her own use, or to the use of her offspring, or any other person in trust for her, in as effectual a manner as though she had been clothed with the legal title. It is similar to the case of a *femme sole* seized of a trust estate who had married and afterwards taken to herself a conveyance of the legal title. Such a case would not be within the proviso of the act of 1821. As the land, notwithstanding the condition of its title, was at the time of the marriage as fully within her control and disposition as though she had a perfect estate in it, there is no reason why the confirmation by the act of June 13, 1812, should be called a grant within the meaning of the proviso of the act of 1821. There is nothing in the case of Hedelston v. Field, 3 Mo. 69, which is inconsistent with the foregoing opinion. We do not deem it necessary at this time to enter upon any discussion of the terms of the proviso of the act of 1821, with a view to ascertain what kind of an estate was intended by them.

The fourth instruction given for the defendant, although it may contain a correct principle in the abstract, yet assumes that the deed of Lee and wife was properly in evidence. Although the acknowledgment may have been sufficient to pass the estate, yet if it was not in such form as would authorize the instrument to be recorded, a copy of its record would not be evidence. In support of the view that the deed was properly read in evidence, the defendant maintains that the statute of December 6, 1821, (1 Terr. Laws, p. 799,) directing the officer taking the acknowledgments of deeds to certify his knowledge of the identity of the grantors, did not require

Garnier v. Barry.

such certificate when the acknowledgment was made in court. The act of December 6, 1821, directs that when justices of the peace, judges, clerks of the courts, or persons authorized so to do, shall take the acknowledgment of any deed or other instrument in writing, made and executed of and concerning any lands, tenements or hereditaments, wherein or whereby the same may be affected either in law or in equity, they shall moreover add a certificate stating that the person or persons making the acknowledgments were personally known to him, or were proved by two credible witnesses (whose names shall be mentioned in the certificate) to have been the proper persons who made and executed the deed or other instrument in writing. Taking this section in connection with the act of June 22, 1821, empowering husband and wife to convey the wife's real estate, it will be seen by its terms it embraces acknowledgments under the act of June 22, 1821. That act prescribes that the examination of the wife shall be taken before one of the judges of the court. There was the same reason for the knowledge of the identity of the grantors in the one case as in the other, and although there might be more difficulty and a greater liability to exposure in attempting to personate another in open court than before an officer in a private place, yet as the thing might be done in either place, there is no reason for so limiting the construction of the act as to make it extend only to acknowledgments taken before an officer. The act of 1825 and all the subsequent acts require the identity of the grantor to be certified as well where the acknowledgment is taken in public as before an officer.

In the second place, it was maintained that under the fifty-eighth section of the act concerning evidence, the deed of Lee and wife was admissible because it had been recorded for ten years, and there was evidence that for ten years consecutively it had been claimed and enjoyed by those claiming through or under such deed. We do not see the application of the section to which reference has been made to the present case. If the deed was not properly recorded for

Refus
to
4 days
want of the necessary certificate of the identity of the grantors, then it was not recorded within the meaning of the section, and it is as though the deed had not been put upon the record. Besides, if it had been so that the copy was admissible, the jury should have been directed that they should be satisfied of the claim and enjoyment of the lot by those claiming through or under the deed before they could regard it as evidence. Although there may have been such evidence, that was not sufficient; for, by admitting the deed without such direction, the minds of the jurors were withdrawn from the consideration of it, and they may have thought it unnecessary to ascertain the fact of the enjoyment of the land by those claiming under the deed. (Allen v. Moss, 27 Mo. 362.) Neither was the copy transcribed from the records read to the jury as a copy of the original deed. The jury were not directed, that if they believed it to be a copy of the original, which was proved to have been mislaid or destroyed, it was evidence. The deed was suffered to be read as a properly certified copy of the record, which was erroneous. As the case stood on the instructions, the plaintiff's eighth instruction should have been given.

We are of the opinion that the certificate of the acknowledgment of the deed by Lee and wife was sufficient to make it effectual for passing the title to the wife under the act of 22d June, 1821. That act seems to have contemplated that the court, before which the acknowledgment of the married woman would be taken, would be composed of more than one judge, and hence requires that one of them should examine the wife and afterwards that she should acknowledge the writing to be again shown to her. At the date of this acknowledgment the circuit courts were composed of but one judge. If the statute is to be literally construed, then no court in which there were not two judges at least could take an acknowledgment of a married woman conveying her land. No one will maintain that the law intended that the circuit courts should be denied the power of taking the acknowledgments of married women to deeds conveying away their

Garnier v. Barry.

estates. The manner of making the acknowledgment prescribed by the act of June 22, 1821, is not suited to a court with a single judge. Now if the statute will bear such a construction as will make good an acknowledgment before a court composed of a single judge, we see no reason why the certificate of acknowledgment endorsed on the deed of Lee and wife is not a sufficient compliance with the law. It sufficiently appears that the wife was examined by the court, and if an examination by one judge is sufficient, we do not see on what ground an examination by three would be bad. It appeared that Mrs. Lee was examined privily and apart from her husband.

The certificate of the acknowledgment of Mrs. Garnier to her and her husband's deed of the 29th of April, 1827, is sufficient. It is not pretended that a certificate of acknowledgment can be helped out by parol evidence, but it will be construed in reference to the laws in force which authorize it to be taken. In this certificate it is stated that "at a term, &c., before me, M. P. Leduc, judge of said court, personally appeared Marie Garnier," &c. This is the most usual form of making up records. If a party appears at a term before the judge of the court composed of a single judge, we can not see how it can be more forcibly expressed that he appeared in court. The act of 1825, under which the deed was acknowledged, did not require that it should be done in open court, and, if it did, we are of the opinion that it so appears from the face of the certificate. The wife was required to appear before some court of record. We can not conceive how the matter could be made to appear more plainly than it does. The certificate is given under the seal of the court and by one styling himself the judge thereof, the court having no clerk.

The objections to the admissibility of the deed of Tholozon and wife in evidence are not valid. The effect of the deed as evidence is another question. Our code at the date of the deed did not and at no time since has prescribed a period within which a deed must be recorded. The deed

when offered had been duly recorded. The statute however made it evidence without regard to its being recorded. As the certificate of acknowledgment proved the identity of the grantors, the eighteenth section of the act concerning evidence was not applicable to it. But as the deed was made and acknowledged in 1830, then, by virtue of the tenth section of the act concerning conveyances of the revised code of 1825, and the sixteenth section of the act concerning evidence of the revised code of 1855, it was clearly admissible in evidence. The deed was also admissible under the forty-fifth section of the act concerning conveyances. (R. C. 1855, p. —, § 45.) As the deed had been duly recorded with an acknowledgment containing a certificate of the identity of the grantors, a copy of it was admissible in evidence.

Adele Tholozon married in 1819. Her mother, Mrs. Sanguinette, died in 1821. The land which she conveyed by deed to Lavielle and Morton in 1830 she inherited from her mother. It was no grant then to her and her heirs within the proviso of the act of 22d June, 1821.

The sixth instruction asked by the plaintiff in relation to the effect of the deed of Tholozon and wife was erroneous, inasmuch as it required the court to direct the jury that the plaintiff must not only have had actual notice of the deed to Laveille and Morton, but also that it had been acknowledged by Mrs. Tholozon and her acknowledgment certified in such manner as to pass the estate of a married woman during marriage. The registry act requires no such notice. If a purchaser has actual notice of a prior unrecorded deed, he must at his peril ascertain whether it is valid; if he purchases with a knowledge of its existence, he takes upon himself the risk whether or not it is valid.

There was no error in refusing the seventh instruction asked by the plaintiff. The fact of the delay in recording the deed from Tholozon and wife was no evidence of itself of any fraud. Every day's experience and observation satisfy us of the truth of this. Nor did the delay furnish any ground for a presumption that the deed had been cancelled,

Williams v. Carpenter.

or that the estate had been revested in Tholozon and wife. The failure to record the deed was a fact in the case, which the party might have used in an argument to the jury with the force the other circumstances gave to it. We do not maintain that the withholding a deed from record may not in some cases be evidence conducing to show a fraudulent intent, but we do say that the abstract fact of a failure to record a deed is not any evidence of fraud.

If the original deed from Lee and wife to Benoist has been lost or destroyed, a copy of it may be proved like the copy of any other lost instrument. We are not aware of any rule or principle of law which would require any greater or stricter proof of the copy of the certificate of the acknowledgment of the wife than of any material part of the deed. If the acknowledgment is endorsed on the deed and is sufficient in law, we do not see why the evidence that would satisfy the jury that the copy of the deed is a true one, would not also satisfy them that the copy of the acknowledgment on the deed is also a true one, nothing appearing which shows that it is not so.

Reversed and remanded ; the other judges concur.

WILLIAMS, Respondent, v. CARPENTER, Appellant.

1. Hunt, United States recorder of land titles, upon proof of inhabitation, cultivation and possession made before him under the act of Congress of May 26, 1824, issued a certificate of confirmation to one *Louis Lacroix*. Held, that the title thus evidenced would not be made to enure to one *Joseph Lacroix* or his legal representatives by showing that it was said *Joseph* and not *Louis* that appeared before the recorder and made proof under the act of May 26, 1824, and that the certificate was issued by mistake to *Louis* instead of *Joseph Lacroix*.
2. Hunt's minutes of testimony taken by the act of Congress of May 26, 1824, are not admissible in evidence except to prove such facts as may be proved by hearsay. If professedly admitted to prove such facts, care should be taken that they are not used for other and illegal purposes.

Williams v. Carpenter.

Appeal from St. Louis Land Court.

This was an action in the nature of an action of ejectment to recover possession of a portion of a lot of one by forty arpens in the Grand Prairie common field, near St. Louis, being the lot covered by United States survey No. 1664. Both plaintiff and defendant claim title under the proof made before Recorder Hunt on the 3d of March, 1825, pursuant to the act of Congress of May 26, 1824. The plaintiff introduced in evidence, against the objection of defendant, certified copies of extracts from the registry of certificates of confirmation issued by Recorder Hunt under the act of May 26, 1824. From these it appeared that on the 3d of March, 1825, said Hunt had issued a certificate of confirmation to Louis Lacroix of a lot of one by forty arpens in the Grand Prairie, bounded on the north by Pierre Barribeau, and on the south by Paul Lagrandeur (alias Guitard); also that on the same day he issued a certificate of confirmation to Pierre Barribeau for a lot in the same prairie, bounded south by Joseph Lacroix. The court also admitted in evidence Hunt's minutes of testimony taken in proof of the claims of Louis Lacroix and Pierre Barribeau. Barribeau testified for Louis Lacroix. The entry of testimony in support of the claim of Pierre Barribeau is as follows: "Pierre Barribeau claiming one and a half by forty arpens in Big Prairie, St. Louis, bounded on the north by a lot formerly belonging to Benito Vasquez, on the south by Joseph Lacroix, and on the east and west by vacant land. Louis Lacroix, being duly sworn, says he knows said lot, and that the claimant Barribeau has been in possession of the same for thirty years and cultivated the same for ten or twelve consecutive years. [Signed] Joseph ^{his} X Lacroix. Test: M. P. Leduc." As stated in the bill of exceptions, the copies of these minutes "were admitted by the court as a part of said confirmations, but not as any evidence of the fact of possession by either of the confirmees prior to December 20, 1803, or of any other fact therein stated except as to location and boundaries."

Williams v. Carpenter.

The plaintiff also read in evidence, against the objections of defendant, the report of Loughborough, the surveyor general, to the commissioner of the general land office, upon said survey No. 1664. This report is dated January 30, 1855, and in it the surveyor general sets forth various reasons for believing that the name *Louis* Lacroix had been used mistakenly for *Joseph* Lacroix. Testimony was adduced with a view to show that no person named Lacroix besides *Joseph* Lacroix resided in St. Louis prior to 1803. It appeared, however, that a person named *Louis* Lacroix had lived in St. Louis.

The plaintiff claims title under *Joseph* Lacroix; the defendant under *Louis* Lacroix. The court, at the instance of the plaintiff, instructed the jury as follows: "1. If the jury find from the evidence that the person who presented the claim for the tract of land in controversy to Theodore Hunt, recorder of land titles, on the 3d of March, 1825, was in fact *Joseph* Lacroix, and that the confirmation certificate was issued to *Louis* Lacroix upon proof of the possession of *Joseph* Lacroix, and that *Joseph* Lacroix was the person who possessed or cultivated the lot in the Grand Prairie common-field adjoining P. Barribeau, as the same is described in the confirmation, then the jury will find for the plaintiff, if he has shown a derivative title to the right and title of *Joseph* Lacroix in the premises sued for. 2. If the jury find for the plaintiff, they will assess as damages the rents and profits of the land from the time of the commencement of this suit to this time, and also assess the value of monthly rents of the land."

The defendant asked the court to instruct the jury as follows: "1. The claim to the right of the possession of the premises in question set up by the plaintiff is not supported by the proof of cultivation by *Louis* Lacroix, made before the recorder of land titles, and tabular lists of the same, which were given in evidence by plaintiff; and unless the jury find from the evidence that the plaintiff has proved clearly and beyond a doubt that *Joseph* Lacroix inhabited, cultivated or

possessed the premises in question prior to the 20th of December, 1803, they must find for the defendant. 2. The plaintiff has not shown by any evidence that the title to the land in question as furnished by the proof of cultivation and possession in the name of Louis Lacroix before the United States recorder of land titles, and the certificate of confirmation issued by said recorder to Louis Lacroix, which were given in evidence, enured to the benefit of Joseph Lacroix or his legal representatives. 3. If the jury find from the evidence that the land in question is part of a commonfield lot in St. Louis Grand Prairie of one by forty arpens, and which lot was inhabited, cultivated or possessed by Louis Lacroix prior to the 20th December, 1803, then the title to the same was confirmed to Louis Lacroix by act of Congress of 13th June, 1812, which was given in evidence, and if so confirmed to Louis Lacroix then the plaintiff is not entitled to recover. 4. The confirmation certificate issued to Louis Lacroix by the United States recorder of land titles, which was given in evidence by defendant, is *prima facie* evidence of title in Louis Lacroix of a common field lot in the Grand Prairie of one by forty arpens, and is *prima facie* evidence of all the facts necessary to prove a confirmation by the act of Congress of 13th June, 1812, given in evidence by defendant; and the United States survey No. 1664, given in evidence by defendant, is *prima facie* evidence of the location, extent and boundaries of the same. 5. If the jury find from the evidence that the land in question is the same tract or lot of land or a part of the same that is mentioned and embraced in the confirmation certificate issued to Louis Lacroix by the United States recorder of land titles, which was given in evidence by defendant, then the plaintiff is not entitled to recover in this suit, unless they also find that the plaintiff has proved clearly and beyond doubt that it was Joseph Lacroix and not Louis Lacroix that made the application and proof of cultivation and possession of said land before the recorder of land titles, as shown by the copy of said proof given in evidence by plaintiff, and confirmation

certificate given in evidence by the defendant. 6. The fact of Pierre Barribeau, in his description of boundaries, calling for Joseph Lacroix for his south boundary does not furnish any evidence of title in Joseph Lacroix to the lot joining said Barribeau on his south or to the land in question, nor in any way affect any title that may have existed in Louis Lacroix to the same lot at that time, or since, but is evidence only upon the question of location. 7. The several deeds which were given in evidence by plaintiff, purporting to show a conveyance of a common field lot of one by forty arpens in the Grand Prairie, from the heirs of Joseph Lacroix through the persons therein named as grantees down to plaintiff, are not to be considered by the jury as furnishing evidence of themselves of title in said Joseph Lacroix or his representatives to such common field lot, unless they also find that Joseph Lacroix was the person to whom said land was actually confirmed." Of these instructions the court gave those numbered one and two, and refused the others.

The jury found for the plaintiff.

Krum & Harding and *McLure*, for appellant.

I. The admission of Hunt's minutes was erroneous. It was not offered to prove the location or boundaries of the land sued for, but to prove that *Joseph Lacroix* was entitled to the confirmation that was made in the name of Louis Lacroix. (17 Mo. 310; 21 Mo. 243; 27 Mo. 55.)

II. The report of the surveyor general was not competent evidence to prove any material fact in issue in the cause. (*Blumenthal v. Roll*, 24 Mo. 113.)

III. The first instruction given in evidence for the plaintiff is erroneous. There was no evidence upon which to base such an instruction. There was no evidence tending to prove that Joseph Lacroix presented the claim for the land in dispute before the recorder. The plaintiff does not seek to recover on the ground of possession and cultivation prior to December 20, 1803. There is no patent, confirmation or survey in favor of Joseph Lacroix. If plaintiff seeks the ben-

Williams v. Carpenter.

efit of this confirmation by reason of any fraud, accident or mistake in the granting of it, he must make a proper case for such relief and ask to reform the confirmation. (*Magwire v. Vice*, 20 Mo. 429.) The instructions asked by the defendant should have been given.

IV. The court erred in admitting the declarations of Joseph Lacroix.

Hill and Whittelsey, for respondent.

I. The court did not err in admitting the declarations of Joseph Lacroix. (1 Greenl. Ev. § 145, 131, 103, 120; 7 Monr. 234; 2 Barr, 55; 18 Ala. 822; 4 McCord, 262; 2 J. J. Marsh. 380; 11 Pick. 308, 362; 13 Wend. 536; 3 A. K. Marsh. 394.)

II. Hunt's minutes of testimony were competent evidence. Defendant's deeds refer to Hunt's minutes. (See Acts of Congress of March 3, 1805, of April 21, 106; June 13, 1812; March 3, 1813; April 12, 1814; April 29, 1816; May 26, 1824; *McGill v. Somers*, 15 Mo. 80; 9 Mo. 477; 11 Mo. 16; 21 Mo. 243; 2 Ad. & El. 171, 182; 27 Mo. —; 18 Mo. 492.)

III. Plaintiff could show what person made the proof before the recorder. The tabular list was only *prima facie* evidence. The court was authorized to admit evidence to show that Louis Lacroix meant Joseph Lacroix. If there be any omission in the instruction given for plaintiff, it was cured by that given for defendant.

Scott, Judge, delivered the opinion of the court.

As the title to all the land in the state of Missouri was originally in the Spanish or French governments or the United States, there was no error in permitting the plaintiff to read evidence showing that the title to the land in controversy had passed from the United States, as without such evidence he could have had no standing in court. Whether he showed that he had acquired that title was a matter to be subsequently determined, and if he did not do this, as he

must have failed in his action, the introduction of the evidence would have caused no prejudice to the opposite party. Both parties claimed the title evidenced by the certificate of confirmation, and the question was as to the enurement of that title. From the instructions given for the plaintiff it appears that he based his right to a recovery upon the certificate of confirmation and the evidence explaining it. As neither party claimed behind the certificate, that may be regarded as the highest evidence of title which could emanate from the government. Had there been a patent on the certificate, that could not have varied their rights; they would have been adjusted on the same ground as on the certificate. Here then is a title that has passed from the government, and the question is, to whom does it belong? The certificate was issued to Louis Lacroix, and Joseph Lacroix, or those claiming under him, maintain that the certificate was granted, by mistake to Louis and that Joseph was the person intended. The case was tried on the theory that Louis and Joseph Lacroix were different persons, and there was evidence showing that there were two such individuals in St. Louis. Now, on this state of facts, can Joseph Lacroix recover the land from Louis by showing that he was the person intended and the one to whom the certificate was granted? If Louis Lacroix was a real person and the certificate was granted to him, though by mistake, could any title have been passed to Joseph Lacroix? Although Joseph might have been entitled to receive the certificate, yet in fact has he obtained it? On what principle, in this form of action, can the title be taken from him to whom it has been granted by law and transferred to another? Where a grant, though by mistake, is made to one, another can not divest him of his title by showing that he was the person for whom the bounty was intended. If the government, on a false suggestion or by mistake, has granted a patent, it can only be avoided by *scire facias* or other suitable proceeding instituted directly for that purpose. It can not be done in a collateral action. The circumstan-

ces of this case do not warrant the application of the principle that by parol evidence one may show that he is the person named as a grantee or patentee. In the case of *Jackson v. Lawton*, 10 John. 23, it is said that if a patent issued by mistake, or upon false suggestions, it is voidable only, and unless letters patent are absolutely void on the face of them, or the issuing them was without authority, or was prohibited by statute, they can only be avoided in a regular course of pleading in which the fraud, irregularity or mistake is directly put in issue. The case of *Jackson v. Hart*, 12 John. 77, illustrates and sustains the foregoing views. There the patent was to George Houseman, under which the plaintiff claimed title. The defendant offered to prove that George Houseman, the patentee, never enlisted nor served in the company of the regiment to the members of which only land was by law to be patented, but that a man by the name of George Hosmer did enlist and serve in that regiment; that he was the person intended by the patent, and that by mistake it was issued to George Houseman. This evidence was rejected and there was a judgment for the plaintiff. It was observed that a latent ambiguity may be explained by parol proof in order to elucidate and explain written words of doubtful sense; as, if a grant be made to John Smith, and there be several persons of that name, parol evidence is admissible to explain which of the persons bearing the same name was intended. So parol evidence would be admissible to prove that George Houseman and George Hosmer were the same person. But certainly it is not explaining a latent ambiguity to prove that a grant to George Houseman, a real person, was intended for another person of the name of George Hosmer, and in that case it was held that a patent, not void but which had been issued by mistake or on an insufficient suggestion, can only be avoided by *scire facias* or other proceeding for that purpose in chancery; that it can not be impeached in a collateral action, as by showing that the patentee intended was a different person and of a differ-

ent name from the one mentioned in the patent. In the case of *Jackson v. Goes*, 13 John. 518, where evidence was received on the part of the defendant to show that a person claiming as patentee was not the patentee intended by the grant, the testimony was that there was another of the same name with him who claimed as patentee and that he was the person intended. This case is not [at] all inconsistent with that of *Hart v. Jackson* above cited. In the case of *Jackson v. Stanley*, 10 John. 133, where parol evidence was received to show a patent void by reason of a mistake in the name of the patentee, it was not pretended that upon the proof of such mistake, the title would enure to the person intended as patentee, but that it would remain in the state.

From the view we take of this case as presented by the record, it would seem unnecessary to determine the other questions made in the court below, but as they may afterwards arise we will now notice them. Had the ground on which the plaintiff placed his right to recover been tenable, we know no principle which would have warranted the admission in evidence of the report of the surveyor general. This report is nothing more than an argument. The officer no doubt sincerely entertained the views he expressed, but he had no authority to make an argument for the purpose of being read in evidence. If he knew the facts stated in his argument, he might have been examined as a witness, and the counsel in the cause would have made the comments to the jury which they justified. If he knew no facts, his statements were mere hearsay, and that unsupported by an oath. If counsel thought the argument a good one, they might have adopted it as a part of their own, and then it would have been understood by the jury. When such a paper is read as evidence, in what light is it to be viewed by the jury? Not knowing how to appreciate it, the use of it in such a way may be the means of misleading them.

There was no dispute about localities or boundaries in the cause. There was then no necessity for reading the depositions preserved in the recorder's minutes. If this evidence


Waugh v. Blumenthal.

has been merely unnecessary, it would scarcely have been worth while to notice its introduction ; but as the party using the recorder's minutes of evidence always expects to gain an undue advantage thereby, they should never be read when it is unnecessary to do so. The court must see the object of the party in using this evidence, and knowing that it is an undue one, though professedly for another purpose, care will be taken that the end in view is not attained, and the attempt to use it illegally should be made to recoil on him who makes it.

We are not aware of any principle which sanctioned the evidence of those witnesses who testified that they had heard Joseph Lacroix say that he had fixed or proved up his claim, and such like conversations.

Reversed and remanded ; the other judges concur.

RICHARDSON, Judge. In my opinion, if the confirmation was to Louis Lacroix and was so intended by the recorder, Joseph Lacroix could not claim the benefit of it by showing that it ought to have been to him. But if Joseph Lacroix was the person who appeared before the recorder and made the proofs, and the recorder intended to give him the certificate of confirmation, but by a mere mistake wrote the name Louis instead of Joseph, then Joseph Lacroix or his representatives, on showing these facts, ought to be permitted to take the benefit of the certificate of confirmation. I concur however in the reversal of the judgment on account of the admission of improper evidence.



WAUGH, Appellant, v. BLUMENTHAL, Respondent.

1. Infants may be plaintiffs in statutory proceedings for partition.
2. The act of February 21, 1845, [R. C. 1845, p. 764,] providing for the partition of land, &c., authorized the joinder of all the parties in interest as parties plaintiff in a statutory proceeding for partition. [Bompart v. Roderman, 24 Mo. 385, overruled.]

Appeal from St. Louis Land Court.

This was an action of ejectment for a portion of a block of ground in the city of Carondelet. The plaintiff was obliged to make title through a judgment and sale in a partition suit, commenced under the partition act of February 21, 1845, in which all the parties were petitioners, and some of them were minors who appeared in the suit by guardian. At the trial the plaintiff offered in evidence the record of the partition suit and also the sheriff's deed to himself, having previously traced the title up to the parties to the partition proceeding. The defendant objected to the record of the partition suit and the sheriff's deed, and specified the following objections and no others: 1st, that all the parties to said partition suit were petitioners, and that therefore the same was an *ex parte* proceeding not authorized by law and so a nullity; 2d, that all the petitioners in said suit except one were minors under the age of twenty-one years and appeared in said suit by guardian. It was admitted that said record and deed were regular and sufficient in every particular except those above specified. The court excluded said record and deed on the ground that they were void for the reasons above stated. The plaintiff took a nonsuit, with leave, &c.

Bennett, Field and Primm, for appellant.

I. The record and deed were admissible. (See Thornton Thornton, 27 Mo. 302.)

F. A. Dick, for respondent.

RICHARDSON, Judge, delivered the opinion of the court.

This case presents only two propositions, which are, first, whether a judgment rendered in a partition proceeding is void, so that it can be collaterally assailed, on the ground that all the parties in interest united in the petition; and second, whether it is void because some of the petitioners are infants who appeared by guardians. The second proposition was discussed and expressly decided in the case of

Thornton v. Thornton, 27 Mo. 302, and some of the reasons given in support of the judgment in that case intimated the opinion of the majority of the court on the first question that arises in this case.

In suits at common law there are opposing parties, usually designated by the names of plaintiff and defendant; but an action, in its general sense, is a proceeding for the purpose of having determined, by the judgment of a court, a real controversy between parties; and, on this idea, our statute regulating practice in civil cases (R. C. 1855, p. 1283) permits parties to a question in difference, which might be the subject of a suit, to agree upon a case containing the facts upon which the controversy depends, and to present a submission of the same to any court which has jurisdiction of the subject matter. The proceeding for partition of land in this state is statutory, and may be said to be in many respects *sui generis*; and as the practice of uniting as petitioners all the parties in interest has been indulged in for many years and in many cases affecting large estates, we think, even conceding that the practice is not strictly conformable to ancient technical rules, that it would be unsafe, as no injustice can result from it, to attempt to reform it merely to vindicate a technical rule, at the expense of sweeping away the only foundation that supports the titles to a large amount of valuable property, which has been acquired and improved and passed from hand to hand in good faith and in perfect confidence in the regularity of such proceedings. In our opinion, however, the practice is sanctioned by the statute. The first section of the partition act provides that when any lands, &c., shall be held in joint tenancy, tenancy in common or coparcenary, it shall be lawful for any one or more of the parties interested therein to present a petition to the circuit court of the county wherein the land is situated for a division and partition of such premises according to the respective rights of the parties interested therein, and for a sale thereof if it shall appear that partition can not be made without prejudice to the owners. The second section directs that the peti-

McPheeters v. Merimac Bridge Co.

tion shall particularly describe the premises sought to be divided or sold, and shall set forth the rights and titles of all parties interested therein, including tenants for years, for life, by the courtesy, or in dower, and of persons entitled to the reversion, remainder or inheritance, and of every person who upon any contingency may be or become entitled to any beneficial interest in the premises; and the third section declares that every person having any such interest as is specified in the preceding section "*may be made a party to such petition.*" The language is not, that all persons interested in the premises may be made parties to the *proceeding*, for they must be parties to it before they can be affected by it; but that they may be parties to the petition, not as defendants but as petitioners. The act contemplates that in some instances all the parties interested would not join in the petition, and hence the fifth section provides that in such cases a copy of the petition with notice that it will be presented to the court shall be served on all parties interested, *who shall not have joined in the petition.* The fifth section performs no function when all the parties unite in the petition, for as it is declared in the third section that all persons interested in the premises may join in the petition, the fifth section can only apply to cases in which some of the parties interested in the land sought to be divided decline or refuse to unite in the petition.

Judge Napton concurring, the judgment will be reversed and the cause remanded.

McPHEETERS, Plaintiff in Error, v. MERIMAC BRIDGE COMPANY *et al.*, Defendants in Error.

1. Public bridges are not subjected by the St. Louis mechanics' lien act of February 14, 1857, (Sess. Acts, 1857, p. 668,) to liens for work done thereon or for materials furnished for their construction.
2. The bridge authorized to be built by the act of February 24, 1853, incorporating the Merimac Bridge Company, (Sess. Acts, 1853, p. 195,) was a public bridge.

Error to St. Louis Land Court.

This was an action to enforce a mechanic's lien against the bridge of the Merimac Bridge Company. The defendants are James P. Langford, Jas. N. Stevenson, Jacob C. Gremm and Henry Gremm, and the Merimac Bridge Company. The plaintiff alleged in his petition that while said defendants Langford and others were contractors performing certain work for the defendant, the Merimac Bridge Company, they became and were indebted to plaintiff in the sum of \$728.48, for castings and materials sold, delivered and furnished, and for work and labor done and performed, &c. The plaintiff set forth the items furnished for the construction of the bridge of the Merimac Bridge Company. It also appeared that he had complied with the requirements of the lien law. To this petition the Merimac Bridge Company demurred. The court sustained the demurrer.

Drake and Wood, for plaintiff in error.

I. The mechanics' lien law, in express terms, confers a lien for materials furnished and used in the erection of bridges. (Sess. Acts, 1857, p. 668, § 5.) The Merimac Bridge Company is purely a private corporation. (See Sess. Acts, 1853, p. 195; Angell & Ames on Corp. 27, 29.) The case of *Dunn v. North Missouri R. R. Co.*, 24 Mo. 494, is not analogous to this. The erection of this bridge was purely a private enterprise, and the fact that a county road leads to or from the bridge can make no change in its character. This bridge would be liable to execution on judgment against the corporation. (R. C. 1855, p. 377, § 8.)

Johnson, for Merimac Bridge Company.

I. The court did right in sustaining the demurrer. The Merimac bridge is a public bridge. It was not subject to a mechanic's lien. (*Dunn v. North Missouri R. R. Co.* 24 Mo. 498.)

SCOTT, Judge, delivered the opinion of the court.

A public bridge is a common highway. A private bridge is similar in its nature to a private right of way and is subject to most of its incidents. (Woolrych on Ways, 195.) The character of a bridge depends more upon the use that is made of it than upon the means by which it was erected. If individuals, for the right to take toll, will make a public highway, the mode of remuneration authorized will not deprive it of the character stamped upon it by the purposes to which it is applied. The charter granted to the Merimac Bridge Company shows that the bridge authorized to be built was a public one, as it was intended to be connected with the highways of the county, was to be built at or near a ferry, and public roads were to be made leading from it. (Sess. Acts, 1853, p. 195.)

The right to erect a bridge and to exact toll from passengers crossing it is a franchise that can only be granted by the state. That right is personal and can not be transferred without express authority of law. In conferring the privilege, regard is had to the ability of the applicant to build and keep up the bridge, and as personal considerations may influence the grant, the franchise of common right is not transferable. There is nothing in the incorporating act which authorizes the company to transfer their bridge to any other body except the county of St. Louis, and such transfer would be inconsistent with the whole design of the law. It seems to be settled that a general assignment by a corporation of all its property and effects will not pass the franchise. The right of transfer in a corporation is confined solely to property. A corporation can not assign its powers and franchises to others to be exercised by them as trustees or otherwise. (Burrill on Assignments, 614.) It has been held that a turnpike road can not be levied upon by an execution issued upon a judgment obtained against the company. (Ammant v. The New Alexandria and Pittsburg Turnpike Road, 13 Serg. & Raw. 210.) The tangible property and estate of a corpo-

McPheeters v. Merimac Bridge Co.

ration is alienable like the property of an individual, but when the interest which the proprietors of a railroad have in the soil over which it passes is merely an easement or right of passing and transporting persons and things over the land of another, it can not be sold, assigned or taken in execution. (Angell on Highways, 411.)

There is nothing in the charter which points out the manner in which the company may acquire such an interest in the land as would authorize the use of the soil for abutments. If the company has merely used the highway it has no such interest in the soil as can be transferred. It does not appear that the company has any interest in any land connected with the bridge. The lien law (Sess. Acts, 1857, p. 668) certainly contemplates that there should be an interest in the land in the person making the improvement. It is true it provides that where improvements have been on leasehold estates, and those estates expire or are forfeited before the lien is satisfied, the improvements may be removed; but it does not appear here that the company ever had any interest in the land. What foundation is there then for a mechanic's lien? Why go to the Land court about it? If the plaintiff is in pursuit of the bridge structure as personal property, it is evident he was rightly put out of court. If the bridge is a public highway, it is not easy to see on what principle it can be sold and removed. The right to take the toll can not be sold, as we have seen; then a public structure, useful to the community, is to be destroyed that its ruins may go to pay the debt not of its owners but of other persons.

Because bridges which are public highways can not be subjected to the liens of mechanics, it does not follow that there may not be bridges which will be subject to them. We have seen there are such things as private bridges known to the law. This consideration is a sufficient answer to the argument founded upon the word "bridges" seen in the fifth section of the mechanics' lien law of St. Louis county. (Sess. Acts, 1857, p. 669.)

Judge Napton concurring, the judgment will be affirmed.

NORTHCRAFT *et al.*, Appellants, v. MARTIN *et al.*, Respondents.

1. A petition is not demurrable because a judgment is asked not warranted by the averments; the court may grant any relief consistent with the case made and the allegations of the petition.
2. Where in a partition suit a sale of the premises is ordered, and previous to the sale it is agreed between certain parties in interest that one of their number shall bid off the property at such sale unless it brings a certain price, and hold it for the benefit of the parties to the agreement and such others of those interested as may choose to become parties thereto, and that the others shall abstain from bidding at such sale, and he does purchase the property under such agreement; *held*, that he will hold it in trust for all the parties in interest.

Appeal from St. Louis Land Court.

Demurrer to a petition. Plaintiffs alleged substantially that Lewis Martin died leaving plaintiffs and defendants in this suit his sole heirs; that all of said heirs joined in a petition for partition of certain premises that had descended to them as heirs of said Martin; that a decree or order of sale was made; that a sale was made and the sheriff acting under the said order sold the premises to the defendant William C. Martin; that immediately prior to said sale by the sheriff and on the day of the sale an agreement was entered into by and between said William C. Martin and certain of the heirs of Lewis Martin, by which it was agreed that the premises hereinafter described should be bid off by the said William C. Martin, providing the same did not bring a certain price per foot for different parcels thereof, and that he should hold the said premises for the benefit of the parties to such agreement and such others of the heirs of Lewis Martin as might, upon being notified, elect to become parties to said agreement; that all the other parties to said agreement agreed to abstain from bidding at such sale; that said property was by such arrangement and agreement purchased in by said W. C. Martin at much below its actual value; that most of the same was sold in bulk although susceptible of

division; that plaintiffs were notified of the said agreement under which said sale was made, and desired to become parties thereto and have the benefit thereof; that William C. Martin refused to permit them to become parties to said agreement or to have any of the benefits thereof according to its terms, and insists that he acquired at said sale and now claims to own said property discharged of all rights in the plaintiffs or any other persons not parties to said agreement, although all the other parties to the same are willing and desirous to allow plaintiffs and all the other heirs of said Lewis Martin to become parties to said agreement and to have all the benefits which may arise therefrom; that said agreement had a tendency to deter competition at such sale and caused said property to sell at much less price than it otherwise would; that said sheriff made a report of his sale and it was confirmed and the sheriff ordered to make a deed; that said deed was made; that afterwards said William C. Martin and wife conveyed a portion of the premises so purchased in by him to one Aloys Heislen. The plaintiffs prayed the court to set aside and annul the sale of the property by the sheriff and the deed; also the sale by Martin to Heislen, and for such other and further relief, &c.

The court sustained a demurrer to this petition.

Bland & Coleman, for appellants.

I. The court erred in sustaining the demurrer. (25 Mo. 309; 20 Mo. 290, 296; 8 Mo. 448.)

Shreve, for respondents.

RICHARDSON, Judge, delivered the opinion of the court.

It is unnecessary to decide whether the demurrer was improperly sustained for the reasons assigned by the plaintiff, because, in our opinion, for other reasons, the petition stated facts sufficient to constitute a cause of action. If William C. Martin, after making the agreement with the heirs, purchased the property at the sale in partition under the cir-

Cowden v. Cairns.

cumstances stated in the petition, he became clothed with a trust for all the parties interested in the sale, which he could not throw off without committing a fraud. The legal title to the land by the sale vested in him, but he held it in trust for the other heirs, and the substantial rights of the parties were not changed or affected by the sale; and, if the allegations of the petition are sustained, the court by a decree should declare the trust, which may be executed by another sale. As to the lots purchased by Heislen, a resale should not be ordered if he bought in good faith or for a fair price, inasmuch as the heirs could be fully indemnified out of the purchase money.

A petition is not demurrable because it asks a judgment not warranted by the averments; nor is its true character determined by the relief it seeks, for when there is a defence the court may grant any relief consistent with the case made and embraced within the issue. (2 R. S. 1855, p. 1280, § 12; *Ashby v. Winston*, 26 Mo. 213.)

The other judges concurring, the judgment will be reversed and the cause remanded.



COWDEN, Appellant, v. CAIRNS *et al.*, Respondents.

1. A defendant can not be permitted to introduce evidence to support a defence to the action not set up in his answer.
2. Where a lease is made to five persons, and there is nothing on the face of the lease to indicate that the lease was made to them for partnership purposes, and under a judgment against one of them his interest in the lease is levied on and sold, and the purchaser institutes an action for partition of the leasehold premises; *held*, that, at law, the lessees held the premises as tenants in common and the purchaser at the execution sale acquired the apparent interest of the execution debtor; that the defendants could not show, by way of equitable defence to the partition suit, that the said leasehold premises were purchased and held for partnership purposes and were consequently personalty and that the execution debtor had no interest therein, unless they set up such a defence in their answer; that if such defence were set up, notice must be brought home to the purchaser.

Appeal from St. Louis Land Court.

The facts sufficiently appear in the opinion of the court. *Bennett*, for appellant.

I. The leasehold property is to be treated as real estate. The plaintiff was entitled to judgment against the defendants upon their answer. Nothing was said in the answer about the leasehold having been held by Fribourg and the defendants as partnership property; much less was it said that the defendants had a lien on Fribourg's interest to pay the debts of the firm or any balance due from Fribourg to either of themselves. Defendants did not set up this defence in their answer. (*Holmes v. McGee*, 27 Mo. 597.) There was nothing on the face of the deed to show that the lessees held the premises in any other manner than as tenants in common. The plaintiff is entitled to protection as a *bona fide* purchaser without notice. (4 Munf. 316; 7 S. & R. 438; 2 Watts, 143; 2 Barb. Ch. 165.) Besides it is not the law that real estate bought and improved with partnership funds for partnership purposes is absolutely and for all purposes converted into personalty. So far as the legal title is concerned, partnership real estate is held by the partners as tenants in common, but the share of each partner is subject to an equitable lien for the debts of the firm and for any balance due from him to his copartners. Each partner holds the legal title to his share in trust for these purposes. It will be converted by a court of equity to the extent necessary to discharge the trusts and meet the exigencies of the partnership. In the present case the partnership had been dissolved, the debts of the firm paid, and all the equities between the partners, except in this leasehold property, fully adjusted. (*Cookson v. Cookson*, 8 Sim. 549; *Bell v. Phyn*, 7 Ves. 453; 3 Bro. C. C. 199; *Green v. Graham*, 5 Ohio, 264; *Carlisle v. Mulhern*, 19 Mo. —; *Hoxie v. Carr*, 1 Sumn. 185; *Goodwin v. Richardson*, 11 Mass. 469; *Blake v. Nutter*, 19 Maine, 16; *Coles v. Coles*, 15 Johns. 16; *Dyer v. Clark*, 5 Metc. 580; *Deloney v. Hutcheson*, 2 Rand. 183;

Cowden v. Cairns.

Holmes v. McGee, 27 Mo. 597; Wiles v. Maddox, 26 Mo. 77.) This is a suit for partition under the statute. If the defendants have any equities they must make them clearly appear in a mode which would entitle them to equitable relief. (See Wilbridge v. Case, 2 Ind. 36; Williams v. Van Tuyl, 2 Ohio, State, 336; Green v. Graham, 5 Ohio, 264; Spitts v. Wells, 18 Mo. 468; 1 Sto. Eq. § 654-8.) The mere fact that the defendants in their answer deny that plaintiff has any interest in the premises is not sufficient to defeat his suit for partition and drive him to an ejectment. (Barnard v. Pope, 14 Mass. 434; Miller v. Dennett, 6 N. H. 109; Lambert v. Blumenthal, 26 Mo. 471; 4 Greenl. Cruise, 256; Cox v. Smith, 4 Johns. Ch. 271; Hosford v. Merwin, 5 Barb., S. C., 51.)

H. N. Hart, for respondent.

RICHARDSON, Judge, delivered the opinion of the court.

Henry Chouteau, in October, 1853, by an indenture of lease demised to the four defendants and Eugene Fribourg, a lot of land in the city of St. Louis for the term of fifteen years from the first of January, 1851. The instrument is signed and sealed by all the parties to it, and on its face is made to the lessees in their individual names, and not as partners. By virtue of judgments recovered against Fribourg, all his interest in the premises was sold by the sheriff and purchased by S. A. Bennett, who conveyed to the plaintiff. The plaintiff then filed his petition for partition, in which he claimed that he was a tenant in common with the defendants of the demised premises for the remainder of the unexpired term, and was entitled to one-fifth part thereof. There is not an affirmative allegation in the answer, and the defendants did not in their answer set up any special matter as a defence, but only denied in general terms that the plaintiff had any right or interest in the premises, or that Fribourg had any at the date of the judgment and sale under which the plaintiff claimed.

The plaintiff at the trial proved every averment in his petition and on the pleadings was entitled to judgment, for the evidence given by the defendants, by which they sought to show that the lot was leased, improved, used and held as partnership property for the manufacturing of soda, and that Fribourg in equity had no interest in it at the date of the judgment and sale, was inadmissible against the plaintiff's objection, as no ground was laid in the answer for the introduction of such proof. (Winston v. Taylor, 28 Mo. 82.) As the lease was made to the defendants and Fribourg in their individual names, it must be regarded at law according to the legal title, and, *prima facie*, they held the estate conveyed by it as tenants in common. If, however, the lease was granted to the partners for partnership purposes and was treated and considered by them as a part of their partnership stock, it would be regarded for many purposes as personality. But the doctrine that converts real estate into chattels is a creature of equity; (3 Kent, 68; Hoxie v. Carr, 1 Sum. 178;) and parties seeking to avail themselves of it are bound to set up the facts out of which the equity arises. (Magwire v. Vice, 20 Mo. 431.)

Although as between Fribourg and the defendants the leasehold might be considered a part of their partnership property, yet as there is nothing on the face of the lease to show that they held it in any other manner than as tenants in common, or to impress upon it any other character than such as the law imputes to it, the plaintiff will be entitled to Fribourg's apparent interest at the time of the judgment, unless it is shown that he had notice of the defendant's equity or circumstances from which notice might be fairly inferred. (Ford v. Herron, 4 Munf. 316; McDermott v. Lawrence, 7 Serg. & R. 438; Colly. on Part. § 135.)

Enough has been said to reverse the judgment, and it is therefore not necessary to consider whether the leasing of a small piece of land by five persons and the erection of a manufactory upon it, or what state of facts, would be sufficient to put a purchaser on inquiry and charge him with

Neiman v. Early.

constructive notice. The question may arise in another trial under a proper state of pleading, and it may be observed that many of the principles that belong to the whole subject will be found ably discussed by Mr. Justice Story in the case of *Hoxie v. Carr*, cited above.

The other judges concurring, the judgment will be reversed and the cause remanded.



NEIMAN *et al.*, Respondent, v. EARLY, Appellant.

1. Where in an action for partition a sale is made by the sheriff under the order of the court, the court may, at any time during the term to which the process issued to the sheriff is returnable, set aside such sale without notice to the purchasers thereat; the court has power to control the execution of its own process, and it is not essential to the exercise of this power that the purchasers should be notified.

Appeal from St. Louis Land Court.

This was an action for the partition of certain lands commenced by Christopher Neiman and others, all the parties interested joining in the petition. At the October term, 1856, of the Land court, the court ordered the sale of three of the tracts of land embraced in the petition. During the same term the sheriff sold said parcels, John Early became the purchaser of one tract, and L. Babcock of another. On the 3d of December, 1856, at said October term, the sheriff made his report of sales to the court. Babcock moved the court to set aside the sale to himself on the ground of an alleged misrepresentation as to the title to said tract. Early had no notice of this motion. The court, at said October term, 1856, the parties to the suit consenting thereto, set aside the sale made by the sheriff, and ordered a resale of all the real estate embraced in the former order of sale. The sheriff made sale of said three parcels under the order of the court, and on the 7th of January, 1857, at October term of said court, filed his report of sale. On the 6th of Jan-

Neiman v. Early.

uary, 1857, Early moved the court to order the sheriff to make him a deed for the tract purchased by him at the sale under the first order. He proved compliance on his part with the terms of sale. The court overruled this motion. Early appealed to the supreme court.

Whittelsey, for appellant.

I. Babcock bought at his peril. He had no reason to move to set aside his purchase. (See *Owsley v. Smith*, 14 Mo. 156; *Evans v. Dendy*, 2 Speer, 9; *The Monte Allegro*, 9 Wheat. 616; *Puckett v. United States*, 4 Am. Law Reg. 459; 2 McCord, 382; 3 Watts, 390; *Schwartz v. Dryden*, 25 Mo. 572.) The court had no authority to set aside the sale for the reasons presented. It is admitted that the court has jurisdiction over its own process until its final return, but that can not be allowed to affect innocent parties, who have no notice and are not in court.

II. The appellant properly sought his remedy by motion. (*Ruby v. Strother*, 11 Mo. 417; *Langham v. Darby*, 13 Mo. 553; *Wooton v. Hinkle*, 20 Mo. 290; *Neal v. Stone*, 20 Mo. 294, 349; *Jackson v. Roberts*, 7 Wend. 83; *Nelson v. Brown*, 23 Mo. 13; *Schwartz v. Dryden*, 25 Mo. 572.)

P. B. Garesché, for respondents.

I. The appellant was too late with his motion. There was no exception taken to the action of the court in setting aside the first sale. That having been done, the order for a resale had to be made as a matter of course. The matter was wholly within the discretion of the court. The appellant was a stranger to the proceedings below, has not been injured and has no right to be here.

NAPTON, Judge, delivered the opinion of the court.

The only question in this case is whether the Land court had power to set aside a sale in partition, at the return term, without notice to the purchaser.

It seems that under the order of the court three several pieces of land were directed to be sold and were sold. A

Neiman v. Early.

day or two after the sale and during the term to which the writ was returnable, one of the purchasers of one of the tracts sold came into court and asked to have the sale set aside on account of an alleged misrepresentation as to the title. By consent of the parties interested in the partition, and without any investigation of the title so far as the record shows, the court made an order for a resale, and in the order directed all three of the tracts to be resold. No objection was made to this course at the time, and no exception was taken. Upon the second sale the tract originally purchased by or struck off to Early in the first sale brought about double the sum it did before, and the other tracts brought less, making the aggregate of sales about the same as at first.

The court had power over the execution of its process until the officer returned it, and it is not believed to be the practice in such cases, or essential to the exercise of the power of the court that the bidders or purchasers should be notified. It is their business to make objections at the proper time and to see to the completion of their title without any formal notice. So long as the term lasts, the matter is in the power of the court to take such steps as under the circumstances may be thought just and prudent. Although we can not see any reason for setting aside the sale to Early, as there seemed to be no connection between his tract or its title and the one which was bought by the dissatisfied purchaser, yet the matter was for the Land court exclusively, and, if objected to, should have been resisted at the time and before a resale was made. We can see that manifest injustice would be done now, if this court should permit the first sale to Early to stand and yet require the partitioners to submit to all the losses occasioned by the second sale.

Judge Scott concurring, judgment affirmed.

RICHARDSON, Judge dissenting. In my opinion, the purchaser ought to have had notice of the proceeding to set aside the sale.

GIBSON, Plaintiff in Error, v. BOGY *et al.*, Defendants in Error.

1. The intention of the parties to a deed, as shown by the entire deed, should govern in its construction; where certain of the words used appear repugnant to the other portions of the deed and to the general intention of the parties, they should be rejected.
2. A call for a monument in a deed, as for a "public road," will be controlled by the other calls therein, if it be apparent that it was inadvertently inserted.

Error to St. Louis Land Court.

The facts sufficiently appear in the opinion of the court.

E. Bates and Gibson, for plaintiff in error.

I. The lot in question was not embraced in the deed from Gamble to Tabor and Collins. The call for the "public road" is the governing call therein.

Hill, Grover & Hill, for defendants in error.

I. The deed to Tabor and Collins embraced the land in dispute. (See 2 Greenl. Cruise, 334-5, note; 12 Ill. 38; 29 Maine, 178; 17 Mass. 211; 3 Greenl. 71; 11 Ill. 97; 29 Maine, 120; 1 Ired. 283; 3 Pike, 18.)

RICHARDSON, Judge, delivered the opinion of the court.

This was an action of ejectment to recover the possession of that part of the United States survey No. 1483, which is situated east of a public road now known as Broadway, in the city of St. Louis. The whole survey is a tract of one by forty arpens, confirmed to Joseph Tayon by the act of Congress of the 29th of April, 1816, and surveyed in 1826. Both of the parties claim under Archibald Gamble, who was the owner of the whole tract in 1833. The deed to the plaintiff is dated in 1856, and describes the land conveyed as being the part of survey No. 1483 which lies east of Broadway. The deed to Collins and Tabor, under which the defendant

Gibson v. Bogy.

claims, is dated December 5th, 1838, recorded 13th February, 1839, and the only question in the case is whether this deed embraced the lot in dispute. It recites "that whereas the said Gamble in the month of June, 1836, sold to the said Charles Collins a certain tract or parcel of land containing the quantity of forty arpens, more or less, being in township forty-five north, in range seven east, lying in the common field of St. Louis, being one arpent in front by forty arpens in depth, bounded on the north by lands formerly of Paul Kiercereau, on the *east by the public road*, on the south by a vacant arpent assigned to the St. Louis Public Schools, and on the west by land of owners unknown, being survey No. 1483, as appears by the records of the surveyor general's office, and for the conveyance of which by quit-claim deed he executed his bond to said Collins." Then follows the granting part of the deed in these words: "We, the above named parties of the first part, do hereby, for and in consideration of the sum of ten thousand dollars to us in hand paid by the said party of the second part, sell, assign and convey, and forever quit-claim, by these presents, all our right, title, claim, interest or estate in or to the above described tract of land of one arpent in front by forty arpens in depth."

In the construction of deeds, the intention of the parties must govern as in other cases of contract. If the language is free from ambiguity, the instrument must be construed according to the plain common meaning of the words, but the construction must be on the entire deed, and not merely on any particular part of it; and it is the duty of the courts "to endeavor to find out such a meaning in the words as will best answer the intention of the parties." It is said that the words are not the principal things in a deed, but the intent and design of the parties; and, therefore, where there are any words in a deed that appear repugnant to the other parts of it, and to the general intention of the parties, they will be rejected." (4 Greenl. Cruise, 307.)

Applying these rules to the construction of the deed under consideration, we think it appears that it was the intention

of Mr. Gamble to convey to Collins and Tabor all his interest in the Tayon tract known as survey No. 1483. It is known as a part of the history of St. Louis that the common fields are in a tier of lots adjoining each other, and that they generally have a common front line. Many of them have a front of one arpent, some one and a half, others two or three or four arpens, by a depth of forty arpens; and they are called one, or one and a half, or two, three or four by forty arpent lots, as the case may be. They are also called common field lots, or arpent lots, and are often designated by the name of the confirmee, as the Tayon arpent, or the Tayon tract, or the Tayon common field; and, after they have been surveyed, they are frequently called by the number of the survey, as survey No. 1483. When speaking of these lots in reference to purchases and sales, they are seldom described by their boundaries, but are most generally identified by the name of the confirmee, as the Tayon arpent or common field lot, or by the number of the survey, though other modes of description may be employed in deeds. Parties are not liable to be mistaken as to the subject about which they contract, or as to its general locality, or whether they are treating for the fractional part or the whole of a common field lot, though they may be deceived as to its particular boundaries; and, in construing deeds like the one in this case, the well established rule may be invoked that when the intention of the parties is not otherwise apparent, it may be ascertained by giving greater effect to those things about which men are least liable to mistake. (4 Greenl. Cruise, note, 335.)

The recital in this deed designates the land as "*being one arpent in front by forty arpens in depth*," bounded on the north by lands formerly of Paul Kiercereau, on the east by the public road, on the south by a vacant arpent assigned to the St. Louis Public Schools, and on the west by lands of owners unknown, "*being survey No. 1483, as appears by the records of the surveyor general's office*:" and it is described in the granting clause as "the above described tract of land

of one arpent in front by forty arpens in depth." The prominent idea, evidently, in the minds of the parties was a tract of one by forty arpens, being survey No. 1483; not a part of the survey, but the whole of the common field lot. The reference to the "public road" was not made for the purpose of fixing the boundary of a part of the tract, but was erroneously assumed to be the eastern boundary of the whole tract; and, as the thing granted was ascertained by a full and correct description, the deed ought not to be defeated by the addition of a further and false description. (*Mayo v. Blount*, 1 Ired. 283.) Monuments generally prevail over the other calls in a deed, unless, taking the whole deed together, they are apparently erroneous, when they will be disregarded; (4 Greenl. Cruise, note 338;) and a boundary may be rejected when it is clear that it was inadvertently inserted, and that a tract with different boundaries was intended to be conveyed. (*Thatcher v. Howland*, 2 Met. 41; *Bosworth v. Sturtevant*, 2 Cush. 392.) The call "of one arpent in front by forty arpens in depth" describes the whole tract, which is not said to be a part of the survey, but as "being survey No. 1483;" and the reference to the survey by its number and the public office where it is recorded made the survey and the plat thereof part of the deed as effectually as if the courses, distances and objects noted in the survey had been particularly mentioned in the deed. (*Davis v. Ranisford*, 17 Mass. 211.) The other judges concurring, the judgment will be affirmed.



ST. LOUIS UNIVERSITY, Respondent, v. McCUNE *et al.*, Appellants.

1. Where a common field lot confirmed by the second section of the act of Congress of April 29, 1816, has a definite and certain location, the statute of limitations will run in favor of an adverse possession prior to an approved survey by the United States. (*Aubuchon v. Ames*, 27 Mo. 87, affirmed.)

St. Louis University v. McCune.

2. Where a proprietor of land, through mistake or ignorance of the true location of the line separating his tract from that of an adjoining proprietor and with no intention to claim beyond the true line of separation, extends his fence beyond such line and encloses a portion of the land of such adjoining proprietor, the possession thus acquired will not be adverse.

Appeal from St. Louis Land Court.

By the act of Congress of April 29, 1816, a common field lot in the St. Louis Grand Prairie common field was confirmed to the legal representatives of Jacques Labbé. By the same act, the common field lot next south of the lot so confirmed to Labbé's representatives was confirmed to the legal representatives of François Lachapelle. These confirmations were surveyed by the United States. The survey of the Labbé lot is numbered 1587; the survey of the Lachapelle lot 1592. The latter survey was made in 1842 and was approved in 1857. The plaintiff claims title under the Labbé confirmation; the defendants under the other. The plaintiff seeks to recover in the present suit a narrow strip of land about 1,205 feet long, and sixteen feet ten inches wide at one end, and nine feet ten inches at the other, containing about one-third of an acre. This strip lies within the Lachapelle confirmation as surveyed by the United States. The plaintiff introduced testimony showing that it and those under whom it claimed "had had open, continued, notorious, uninterrupted and visible possession of the land sued for, for more than twenty years prior to the entry of defendants, by actual enclosures, and that in March, 1836, the division fence was upon the line claimed by plaintiff as the south line of the land sued for, and that said fence was then old, and had the appearance of having been there many years, and that prior to defendants' entry in 1856, the line had not been disputed, and that plaintiff's possession had been held by the line of the old fence, and that defendants entered and put up the fence on the line of the survey in August, 1856." There was no evidence showing any agreement as to the line, except the actual possession by the fences, which possession was recognized and acquiesced in by the neighboring proprietors.

The court gave the following instruction at the instance of the plaintiff: "If the jury find from the evidence in this cause that after the confirmations respectively to the representatives of Jacques Labbé and Lachapelle of adjoining tracts of land, Lachapelle's representatives or those claiming under them entered upon the land so confirmed to Lachapelle's representatives, and fixed a boundary between the tracts of land so respectively confirmed to said Lachapelle's representatives and said Labbé's representatives, and marked the same by stones or other monuments, and built a fence along and upon said line, and claimed and occupied only up to said line for more than twenty years, and that the representatives of Jacques Labbé or those claiming under them agreed and assented to said line, and took possession of and occupied the land in question up to the said line for more than twenty years before the commencement of this suit, the plaintiff ought to recover."

The defendants asked the court to instruct the jury as follows: "1. If the jury believe from the evidence that the defendants are in possession of the land sued for within the lines of survey No. 1592 for F. Lachapelle's legal representatives as made by the United States, and that said survey was made in 1842 and approved in March 2, 1857, then the jury will find for the defendants. 2. If the jury believe from the evidence that the plaintiff claimed title to part of survey No. 1587 under Jacques Labbé, and his possession has extended over the line before the survey was made by the United States for defendants, then said possession was not adverse to the title of defendants, as it was a mistake as to the true line. 3. The plaintiff claiming title under the confirmation to Jacques Labbé and survey No. 1587, any possession by plaintiff over the lines of his confirmation will not be adverse to the defendants, claiming under F. Lachapelle's survey No. 1592, until a survey was made by the United States marking out the dividing line between the confirmations of the plaintiff and defendants respectively." The court refused these instructions, but instructed as follows for

the defendants: "4. If the jury believe from the evidence that the possession of the plaintiff of the land sued for was by mistake as to the true line between the parties, their said possession was not adverse."

The cause was tried by the court without a jury. The court found and rendered judgment for plaintiff.

Field and Whittelsey, for appellants.

I. There was no adverse possession beyond the true line, for the reason that manifestly there was no claim of title beyond that line. Bare possession, unaccompanied with a claim of title, or originating in accident, ignorance or mistake, is not adverse to the true owner. (See *Cutter v. Waddingham*, 22 Mo. 266; *Jackson v. Porter*, 1 Paine, 466; *Riley v. Griffin*, 16 Geo. —; *Brown v. Gay*, 3 Greenl. 226; *Ross v. Gould*, 5 Greenl. 240; *Lincoln v. Edgcomb*, 31 Maine, 345; *Gilchrist v. McLaughlin*, 7 Ired. 315; *McKenny v. Kenny*, 1 A. K. Marsh. 460; *Cleveland v. Flagg*, 4 Cush. 76; *Olwine v. Holman*, 11 Harr. 285.) The instruction given for the plaintiff was erroneous. (*Taylor v. Zepp*, 14 Mo. 482.)

II. Until the survey made by the United States definitely located the line between the parties, the intention which constitutes an adverse possession was wanting. (See *Jourdan v. Barrett*, 4 How. 169, 184; *Bryan v. Forsyth*, 19 How. 384; *West v. Cochran*, 17 How. 415; *Ledoux v. Black*, 18 How. 475; *Cousin v. Blanc*, 19 How. 202; *Cabanné v. Lindell*, 12 Mo. —.) The point presented in this case differs from that of *Aubuchon v. Ames*, 27 Mo. 89, or that of *Landes v. Brant*, 10 How. 348. See *Menkens v. Blumenthal*, 19 Mo. 496; *Ang. on Lim.* § 384; *Comegyss v. Carley*, 3 Watts, 280; *Bradstreet v. Huntington*, 5 Pet. 440; *Ewing v. Burrett*, 11 Pet. 41.

Krum & Harding, for respondent.

I. Uninterrupted, continuous possession for more than twenty years is shown by the testimony. This possession was adverse; it was in pursuance to a claim. The fence was

made upon a line dividing the two tracts. The parties held possession up to the fence. Lachapelle's representatives acquiesced in this claim and possession. It was not necessary to show an express agreement. (*Biddle v. Mellon*, 13 Mo. 335; *Joyal v. Rippy*, 19 Mo. 660.) The instruction given at the instance of plaintiff was correct. The parties made a practical location or designation of the dividing line between them. From their acts an agreement in respect to the dividing line may well be inferred. (*Taylor v. Zepp*, 14 Mo. 482; *Rockwell v. Adams*, 6 Wend. 467.) The instructions asked by the defendants were properly refused.

RICHARDSON, Judge, delivered the opinion of the court.

The dispute in this case is about a small strip of land on the line between two common fields in the Grand Prairie of St. Louis. Both of the lots were confirmed by the act of Congress of the 29th April, 1816, but the official survey of the defendant's lot was not approved until 1857, and it does not appear when the survey of the plaintiff's confirmation was approved.

The first question that arises is whether there can be an adverse possession of a confirmation under the act of 1816 until the confirmation has been surveyed and the survey approved. That question was discussed and decided in the case of *Aubuchon v. Ames*, 27 Mo. 89, which is not distinguishable from this case, and the instructions therefore asked by the defendant bearing on that point were properly refused.

If the plaintiffs erected their fence accidentally upon the defendant's land through mistake or ignorance of the correct line separating the tracts and without intending to claim beyond their true line, then the line of occupation thus taken and the possession that followed it did not work a disseisin. The proposition is fully sustained by the authorities cited in the defendant's brief.

The instruction given for the plaintiff contained, in the abstract, a correct statement of the law, which is illustrated and approved by the supreme court of the United States in

the case of *Boyd v. Graves*, 4 Wheat. 518; but the evidence preserved in the record did not warrant it, and for that reason it is erroneous.

The other judges concurring, the judgment will be reversed and the cause remanded.

PRINCE, Respondent, v. COLE, Appellant.

1. Since the enactment of the practice act of 1849, the supreme court will reverse for error committed during the progress of a trial and duly excepted to, although the same may not have been brought to the attention of the court by a motion for a new trial.

Appeal from St. Louis Court of Common Pleas.

This was an action to recover six hundred and eight dollars for the board, lodging, washing and clothing of a certain slave boy, named Richard, belonging to the estate of Presley N. Ross. The defendant Cole was one of the administrators of said Ross. Said Richard was a son of the plaintiff. Ross died in 1845. Plaintiff also belonged to the estate of Ross. He and his wife were sold at an administrator's sale in 1849 to one Baker, who immediately emancipated the plaintiff. Immediately after this administrator's sale, Cole, the administrator, took away two of the children of plaintiff, but left the boy Richard with him. There was evidence tending to show that Cole told plaintiff to take the boy Richard and take care of him. One Yosti was introduced as a witness on behalf of the defendant, who testified that he became entitled to Richard in 1854 in right of his wife, who was a daughter of Ross; that he talked with plaintiff frequently about the boy Richard; that plaintiff requested him to leave Richard with him as long as he could possibly do without him; that he did do so to his own inconvenience; that plaintiff applied to witness to purchase Harry, an older brother of Richard; that he sold Harry to plaintiff at less than his

Prince v. Cole.

value, because he was his father and because he said he had raised Richard at his own cost and expense ; that plaintiff paid nine hundred dollars for Harry. Harry was sold to plaintiff before Richard was taken home by Yosti. The court refused to permit the witness to state what the value of Harry was at the time of his sale.

The jury found for plaintiff.

Bland & Coleman, for appellant.

I. The court erred in refusing to allow Yosti to state the value of the boy Harry. The court also erred in refusing the instructions asked by defendant. The instructions given were erroneous.

H. N. Hart, for respondent.

I. The instructions given presented the law of the case fairly and fully before the jury.

RICHARDSON, Judge, delivered the opinion of the court.

The evidence of Mr. Yosti tended to show, first, that the plaintiff had no just claim whatever on the administrator for taking care of his own child, and that he was not entitled and never expected to receive remuneration from any person ; and, in the second place, that if he was entitled to any thing, he did not look to the defendant, as he was compensated by the owner of the slave, to whom he directly appealed, in the reduced price at which he was allowed to purchase Harry. In this view it was proper, not only to ascertain the price at which Harry was sold, but to inquire what he was worth. We think, then, that the court improperly refused to permit the witness to state the value of Harry at the time he was sold to the plaintiff.

It appears that the defendant excepted at the time to the ruling of the court in excluding this evidence, but did not assign it as a reason in his motion for a new trial. Formerly, exceptions taken during the progress of a trial were deemed to be waived if they were not noticed in a motion for a new

Robinson v. City of St. Louis.

trial, but it has since been decided that the act of 1849 introduced a different practice, and that such an omission will not preclude a party from insisting on his exceptions in this court. (*Fine v. Rogers*, 15 Mo. 315; *Wagner v. Jacoby*, 26 Mo. 530.)

The instructions which the court gave before the retirement of the jury stated the facts hypothetically in two different ways, covering the theory of each of the parties, and presented fairly and fully the law of the case. But the instruction, marked C, hurriedly given on the return of the jury, was erroneous, as it was vague and calculated to mislead. The other judges concurring, the judgment will be reversed and the cause remanded.



ROBINSON, Respondent, v. CITY OF ST. LOUIS, Appellant.

1. The inspector of the fire department of the city of St. Louis had power, under the thirteenth section of the ordinance establishing and regulating the fire department, approved April 5, 1856, (Rev. Ord. 434,) to order and contract for repairs of engine houses, where the repairs ordered amounted to more than fifty dollars; a contract for repairs made by him as inspector, though not made in the name of the city of St. Louis, would be binding upon her.

Appeal from St. Louis Land Court.

This was an action commenced to enforce a mechanic's lien on the engine house of the Liberty Fire Engine Company of St. Louis. The said company and the city of St. Louis were defendants. A judgment by default was rendered against the company. At the trial the plaintiff adduced in evidence ordinance No. 3595 of the city of St. Louis. By the thirteenth section of this ordinance, it is provided among other things as follows: "Sec. 13. All repairs to engine houses or apparatus amounting to more than the sum of fifty dollars shall, on the certificate of the inspector, by whom only such repairs shall be ordered, be paid out of the city

treasury, out of appropriation for fire department; all other expenses made or incurred by any fire company on its own order shall be payable by said company out of its quarterly allowance. It is also hereby," &c. George N. Stevens was then introduced as a witness. He testified that he had been inspector of the fire department since 1856; that as such inspector he made a contract with plaintiff to repair the engine house of the Liberty Fire Company. This contract was as follows: "St. Louis, March 28, 1857. This article of agreement for repairing the Liberty engine house, made this day and date by and between George N. Stevens (inspector of the fire department of the city of St. Louis) of the first part, and James P. Robinson of the second part, both of the city and county of St. Louis, witnesseth, that the said party of the second part, for and in consideration of the sum of \$1,788.50, contracts and agrees to repair said Liberty engine house according to the above specifications; and on the fulfillment of contract as above mentioned, the said party of the first part agrees and binds himself by this article to pay unto said party of the second part the above mentioned sum of \$1,788.50. Witness our hand and seal, the day and date aforesaid. [Signed] George N. Stevens, Inspector Fire Department." Stevens also testified that the work done by plaintiff under said contract was worth \$1,788.50; that he as inspector certified the same to be correct; that the city was in the habit of paying amounts certified by him for repairing engine houses. It also appeared that the necessary steps had been taken to secure a lien. The defendant asked the court to instruct the jury as follows: "The jury are instructed that the defendant is not a party to the contract read in evidence, and therefore the plaintiff can not recover in this action." The court refused to give the instruction. The jury found for the plaintiff.

Bay (city counsellor) for appellant.

I. The court erred in refusing the instruction asked by defendant. There is a fatal variance between the contract charged in the petition and the one given in evidence.

Robinson v. City of St. Louis.

Cline & Jamison, for respondent.

I. The court did not err in refusing the instruction asked. The fire inspector had power to make the contract. It was binding upon the city. (Angell & Ames on Corp. § 294; Story on Agency, 160; Mechanics' Bank of Alexandria v. Bank of Columbia, 5 Wheat. 326; 9 Mass. 321; Dawes v. Jackson, 9 Mass. 464; Hovey v. Magill, 2 Conn. 680.) The certificate of the inspector bound the city.

SCOTT, Judge, delivered the opinion of the court.

The thirteenth section of the ordinance establishing and regulating the fire department (Rev. Ord. 1856, p. 438) empowered the inspector of the fire department to order repairs to engine houses where they exceeded in value fifty dollars. In pursuance to this ordinance the inspector made a contract with the plaintiff to repair the Liberty engine house for a sum exceeding fifty dollars. The only point, it seems, made for the city for the reversal of this judgment is, that it does not appear from the face of the contract that it was made by the city. There is no foundation for this objection. The inspector was sworn as a witness and proved that the contract was made by him for and on account of the city. The principles asserted in the case of the Mechanics' Bank of Alexandria v. The Bank of Columbia, 5 Wheat. 326, sanction the introduction of this evidence. But there was no necessity for any such evidence, for the contract on its face showed that it was made for the city. It was made by George N. Stevens, who was the fire inspector, as such inspector, and it was signed by him as such officer. As the ordinance gave the inspector authority to contract, he was not an agent in that sense of the word that made it necessary for him to use the name of the city in contracting.

Affirmed, the other judges concurring.

CHOUQUETTE *et al.*, Respondent, v. BARADA, *et al.*, Appellants.

1. The courts should not, in instructions to a jury, take for granted facts in issue in the cause.
2. Where a deed, purporting to be the deed of a corporation, is admitted, and no objection is made to its introduction on the ground that the corporate seal has not been proved, this objection will not be entertained in the supreme court.
3. Where an instrument purporting to be the act of a corporation has the common seal of the corporation attached and has been signed by the proper officer, it will be presumed that it was executed by authority of the corporation.
4. A will not providing for children of the testator, though voidable under section twenty of the act concerning wills and testaments, (R. C. 1825, p. 795,) by such children, is good as against strangers; unless the children assert their right against the will, the title will remain in the devisee, who will have, however, a defeasible title.
5. Where land owned by A. is in the adverse possession of B., and B. dies before the time of limitation is complete, devising his estate to his widow, but not naming or providing for his children in his will, and the widow remains in possession, not claiming under the will, but under an understanding with the children that she should enjoy the estate for life and that at her death it should go to them, and while she so remains in possession the time of limitation becomes complete and the widow's interest is levied on under a judgment against her and sold and she dies; *held*, that the agreement of the widow with the children would be valid though by parol, it not being within the statute of frauds; that the purchaser would take subject to such agreement, whether he had notice of it or not.
6. Courts should not in instructions comment on the evidence; it is the province of the jury to draw inferences from the facts in evidence; the courts should not give undue importance to particular facts in evidence by telling the juries that they are authorized to draw certain specified inferences from them.

Appeal from St. Louis Land Court.

This was an action in the nature of an action of ejectment to recover possession of a parcel of ground in the city of Carondelet. The cause has heretofore been before the supreme court, whose decision is reported in 23 Mo. 331. The defendant Barada was in possession as tenant of Sullivan and Papin, who were permitted to become parties defendant. The

defendants by their answer denied the title of the plaintiffs and alleged an adverse possession in themselves, or those through whom they claim, for more than twenty years before commencement of this suit. At the trial the plaintiff gave in evidence Brown's survey of Carondelet common; also a certified copy of an ordinance of the city of Carondelet, approved March 18, 1852, ordering the making of certain surveys and authorizing the making of deeds of quitclaim of lands embraced within said surveys; also a copy of a resolution dated August 5, 1852, of the city council authorizing the mayor to convey the lot in controversy to the children of Antoine Motier. The defendant objected to the admission of this resolution on the ground that it wanted the evidence required by the charter of its passage and authenticity. The plaintiffs then introduced in evidence the deed of the city of Carondelet, dated August 14, 1852, to certain of the plaintiffs and to others their grantors. This deed purported to be made in pursuance of said resolution of August 5, 1852. Deeds from certain of the grantees in this deed and heirs of Antoine Motier, sr., to certain of the plaintiffs were then introduced in evidence.

The defendant introduced evidence showing that between 1821 and 1824 Antoine Motier, sr., went upon the land with his family, built a log house thereon, planted an orchard, made a garden, and with his family occupied the premises in controversy until his death in 1834; that he made a will whereby, without naming or providing for any of his children, he gave all his property to his widow. This will was dated January 6, 1834, and was proved March 8, 1834. The widow got the will probated, and resided on the land with her children until evicted by Sullivan and Papin in October, 1847. Her children continued to live with her until they married, but left her as they married, except Antoine Motier, jr., who had married before his father's death and resided elsewhere. Mr. Barada, a witness for defendants, testified that he was born and had always lived in Carondelet; that he knew the Motier family well, and when Motier, sr., went

Chouquette v. Barada.

on this land and built his log house; that he drew his said will, and with the widow and at her request attended upon its probate; that after her husband's death she claimed and sued for several tracts of land in the common fields of Carondelet, which she claimed under her father Clement Delor; that her claim embraced this land, for it ran all the way to the Mississippi river; that she sued persons upon different parts of it; that she claimed the land, as witness believed, under her husband and Delor; that she claimed land under her father in the common field; that the common field came only to Fifth street; that she claimed to the river and that would include this land. The defendants also introduced a deed of the sheriff of St. Louis county, dated June 26, 1841, conveying to Sullivan and Papin all Madame Motier's interest in the land in controversy. In October, 1847, Sullivan and Papin were put in possession by the sheriff under a writ of possession issued upon a judgment in ejectment in their favor against said Madame Motier. The defendants then offered to read in evidence a lease of this land from Sullivan and Papin to Baptiste Motier, one of the children of Madame Motier, dated October 6, 1847; also the record of a suit for an unlawful detainer, begun July 2, 1850, by Sullivan and Papin against Julien Chouquette, one of the plaintiffs, for the land in controversy. Plaintiffs objected to the admission of these as irrelevant except to prove Sullivan and Papin in possession, and upon plaintiffs admitting that they had been in possession ever since the execution of said writ of possession in 1847, the court excluded them.

The plaintiffs in rebuttal introduced as a witness Antoine Motier, who testified that after his father's death his mother held the property, claiming under her husband, and claimed to occupy this land for herself and children, for herself during her lifetime, and for her children after her death; that she occupied the property without objection from her children; that she had several occasions for selling it; that he, witness, would try to persuade her to sell it and with the money buy a smaller piece of land and live upon the balance

of the money, but she would always refuse, saying that she meant to save it for her children ; that he, witness, would tell her that her children could take care of themselves, but she would refuse to sell, saying that she would save it for her children ; that he thinks his mother died in 1854 or 1855 after the making of the deed by Carondelet. Mr. Gamache testified that he was born in Stringtown, near Carondelet, and had lived in Carondelet since 1825 ; that he had heard widow Motier say that she was occupying this land for herself for her life and for her children after her death ; that he used to visit her on this land, and that at these visits she said this in conversations there ; that she died in the house on this land in 1852 ; that he heard her say that she claimed a life estate and then it was her children's ; that he heard her say this as long, as he thinks, as five years before her death ; he would not say that it was as long as six years before ; that he heard her say it two or three years before her death ; that he could not say whether he heard her say this before or after the late Mexican war ; that he may have heard it as early as 1842 or 1843.

At the request of plaintiffs the court instructed the jury as follows : " 1. The plaintiffs have shown themselves to be clothed with the documentary title to the land in controversy, and unless the defendants and those under whom they claim have had adverse possession of the premises for twenty years before the commencement of this suit, the plaintiff must have a verdict. 2. If the jury believe from the evidence that Madame Motier, after the death of her husband, did not claim the premises in controversy for herself in fee, but only claimed it for herself for life, and thereafter for the children of herself and Antoine Motier, and that this was the understanding between herself and her children after the death of Antoine Motier, then there was no adverse possession of said land by Madame Motier prior to 1847 ; and in that event the defendant can not avail himself of the statute of limitations. 3. The possession of the land by Madame Motier with her children after the death of her hus-

Chouquette v. Barada.

band was, unless shown to be otherwise, the possession of her children as heirs of Antoine Motier."

The defendants requested the court to give the following instructions, of which the court gave those numbered one and two, and refused the others: "1. If the jury believe from the evidence that the defendants, and those from and through whom they obtained possession of the land sued for in this suit, had had a continuous possession thereof for at least twenty years next before the commencement of this suit, claiming the same adversely to all others, then they should find for the defendants. 2. The jury should disregard any claims of Madame Motier made touching this land after the sale thereof by the sheriff to Sullivan and Papin. 3. If the jury believe from the evidence that Antoine Motier took possession of the property under a claim to it by his wife, and that the defendants Sullivan and Papin and those under whom they claim had had a continuous possession thereof, claiming the same adversely to all others, for twenty years next before the commencement of this suit, they should find for the defendants. 4. The will given is evidence for the jury to consider with reference to the way in which Mrs. Motier claimed possession of this property after her husband's death. 5. If the jury believe from the evidence that the survey of the common of Carondelet by the United States was not approved by the United States until after the date of the deed of Carondelet read in evidence, then the plaintiffs acquired no title under said deed. 6. The deed of Carondelet given in evidence, and the resolution given in evidence referred to therein, are void and of no effect. 7. The resolution given in evidence by the plaintiffs the jury should disregard."

The jury found for plaintiffs.

Todd, for appellants.

It was error to instruct the jury that the plaintiffs had shown themselves to be clothed with the documentary title. It took questions of fact from the jury. The court erred in

giving the second instruction for the plaintiffs. The third instruction was also erroneous. The court also erred in refusing the instructions asked by defendant, in admitting the resolution authorizing the mayor to convey to Antoine Motier and others, also in excluding the lease to Baptiste Motier and the record of the unlawful detainer suit. The verdict was clearly against the evidence.

Gantt, for respondents.

I. The resolution introduced was properly authenticated. Besides, it is immaterial whether it was or not; the deed was no less the deed of Carondelet even if this resolution was entirely ignored. (*Schwartz v. Page*, 13 Mo. 603.) The court did not err in excluding the lease to one of the grantors of plaintiffs and the record of the forcible detainer suit. The instructions given were a correct exposition of the law. The court did not err in refusing those offered by defendants. (See *Donald v. Byrne*, 2 Batty, 373; *Cook v. Nicholas*, 2 W. & Serg. 27; 13 Mo. 603; *Buller's N. P.* 102; 1 Fairf. 256; 7 Paine, C. C. 457; 9 Wheat. 288; 2 S. & R. 527; 2 Salk. 423; 5 Burr. 2604.)

SCOTT, Judge, delivered the opinion of the court.

I do not see how the plaintiffs can get along with their first instruction. If they relied on the documentary title, (which I understand to be the deed from Carondelet,) then they did not claim as heirs of Motier, and the case was nothing more than it was when formerly here as reported in 23 Mo. 331. I adhere to the opinion expressed in that case. If the heirs of Motier rely for title on the deed from Carondelet and nothing more, (and the instruction is based on that deed alone,) then twenty years' adverse possession in the defendants and those with whom they claim in privity will bar Carondelet and those claiming under her. Motier's will was not a nullity; it would pass a title, though a defeasible one. Under the circumstances, I do not see what the deed from Carondelet had to do with the plaintiffs' case. Their right,

as founded on that deed, has been contested, and I have seen nothing since to induce me to depart from the judgment heretofore pronounced on that title. The instruction was wrong in itself. It took for granted that the deed, whose legal existence was in issue before the jury, was a legal and effective instrument. Whether the deed was one or not was a question for the jury, and the court could not, by an instruction, usurp their province and direct them that the existence of an instrument was established when the question was one exclusively for them.

The deed from Carondelet was read and objections were made to it, but there was no objection on the ground that the seal of the corporation was not proved. Under these circumstances, that objection can not be regarded in this court.

By the first section of article eight of the act incorporating Carondelet, the corporation had authority to dispose of its commons. The seal of the corporation being fixed to the deed by the proper officer and signed by him, the presumption is that it was done by proper authority, and the burden of proof is on him who maintains the contrary. (*The Public Schools v. Risley*, ante p. 415, decided at this term.)

The record does not show that there were any objections made to the reading of the deed. There is an instruction asked directing the jury that the deed was void. But a party should not, by way of instruction, be permitted to take an exception to a deed in evidence, when if the objection had been taken on the trial it might have been obviated.

As the lease was made and the forcible entry and detainer tried during the life of Madame Motier, I do not see what influence these facts could have had on the merits of the case. If these occurrences had taken place after the death of Madame Motier, they would have been evidence against those who were agents in them.

If there was an understanding between Madame Motier and her children that she should remain in possession of the land as doweress or as being entitled to remain there under

the law until her dower was assigned, and that she would not take the land under the will nor claim it otherwise, no writing was necessary to prove this arrangement, and under it the statute of limitations could have no operation against her children, whatever may have been the law as to Carondelet. The statute of frauds would have nothing to do with such arrangement, as it had actually been carried into effect. Such an agreement by parol and if executory could not be enforced, but after it has been made and carried into effect by the parties there is nothing in the statute which prevents its previous existence from being shown by parol, as it was not done with a view to maintain an action on the agreement. Whether or not the defendants had notice of this understanding can not vary their condition. They bought the right, title and interest of Madame Motier, and they can not insist on the statute of limitations for her, when by her conduct she had given assurances to her children that her occupation was not in hostility to their rights. Nor could they force her to accept the devise.

After any interest in the land Madame Motier may have possessed had been sold, of course she could not affect it in the hands of the purchasers by her conduct or declarations. But it was a question for the jury, under all the circumstances, whether there was an understanding with regard to the holding by the widow and the time at which it was made.

Whether by the understanding Madame Motier was to have a life estate only, or the fee simple, was a question of fact for the jury, as the agreement was not in writing. (Halbert v. Halbert, 21 Mo. 275.)

The will was in evidence, and the defendants were at liberty to make such comments upon it and to draw such inferences from its existence as were warranted under the circumstances. When a party has secured the admission of his evidence, he has no right to give it an undue importance by an instruction to the jury as to the use they may make of it. Counsel can make their own comments on the evidence, and the jury will determine their weight. If such instructions

Chouquette v. Barada.

are refused, they can not come into this court and complain that their refusal was tantamount to telling the jury that the inference they sought to draw from the evidence was unwarranted. We do not know that refused instructions are read in the hearing of the jury, and, if they are, counsel can not expect, by asking improper instructions, to gain an advantage in this court. No court in trying a cause would permit the refusal of an instruction to operate to the prejudice of the party asking it by suffering such refusal to be made the ground of an unwarrantable inference. Where the law fixes the weight or effect of evidence, there is no impropriety in the courts declaring it to the jury; but when one fact or piece of evidence is merely used to show the existence of another fact which is to be found by the jury, the court can not, by way of instruction, direct the jury that the inference is warranted. If it is so, the law presumes the juror more competent to draw it than the judge. Our law will not allow the judge even to comment on the evidence, where the jury may give what weight they please to the comment. But this practice would, by way of imperative instruction, compel the jury to make an inference or otherwise have their verdict set aside, a consequence which does not necessarily follow from a refusal on the part of a jury to be governed by the comments of the court. In my opinion, the judgment should be reversed and the cause remanded.

RICHARDSON, Judge. The plaintiffs claim the land in controversy under two titles; first, as purchasers from Carondelet, and secondly, as heirs of Antoine Motier.

The possession of the widow was in privity with that of her husband, and whether she claimed the absolute estate, or only a life estate, recognizing the right of her children to the reversion, is immaterial so far as Carondelet is concerned, for her possession was certainly adverse to Carondelet, though it may not have been so as to her children. Her possession was transferred by act of law to the defendants, and so a continuous adverse possession for more than twenty

years was established after the period that Carondelet was incorporated and in a condition to sell. (23 Mo. 331.) The second instruction then was erroneous, for the plaintiffs went to the jury with proof in reference to both of the titles under which they claimed, and the facts hypothetically stated in the instruction did not prevent the statute of limitations from running against one of them.

In my opinion there is nothing in the will to prevent the plaintiffs from recovering on their title as heirs of their ancestor. The will is not void, and for many purposes, as against strangers, it may operate as a valid instrument; but, like the deed of an infant, it may be avoided by the children not named nor provided for; and when, as in this case, *all* of them are pretermitted, they may avoid it in an action of ejectment. The course would be different, if some of the heirs were provided for in the will and others not. (Hill v. Martin, ante p. 78.)

I am in favor of reversing the judgment and remanding the cause.

O'BRIEN, Appellant, v. PERRY *et al.*, Respondents.

1. On the third of October, 1807, one A. gave to the United States recorder of land titles a notice in writing to the effect that he claimed, as assignee of B., six hundred and thirty-nine acres of land situate at Mine à Breton, by virtue of "inhabitation and cultivation" thereof by said B. This claim was presented to the board of commissioners in 1807, but was not then acted upon. In 1811, the claim was again presented to the board and was rejected on the ground that B. claimed another tract of land by concession. In 1820 notice of the claim was filed in the land office at Jackson, Mo., and the land was marked out as reserved from sale on the plat on file in said office by red dotted lines. In 1825, Recorder Hunt, upon proof made before him by C. and D., who were the legal representatives of A. and B. as respected the whole tract claimed at Mine à Breton, issued certificates of confirmation to said C. and D. for two lots—one a village lot in Mine à Breton, and the other an outlot of said village containing about fourteen arpens. Both these lots were embraced in the tract of six hundred and thirty-nine acres as claimed before the recorder by A. On the 3d of De-

O'Brien v. Perry.

cember, 1833, C., who had acquired the interest of D., submitted said claim for the said tract to the board of commissioners organized under the act of Congress of July 9, 1832, and adduced testimony in its support. The board took no action thereon. On the 7th of August, 1834, C., in consideration of the privilege of preëmption granted by the third section of the act of Congress of July 9, 1832, taken in connection with the supplementary act of March 2, 1833, waived and relinquished to the United States, by deed duly executed, all claim whatever to said tract of six hundred and thirty-nine acres. The description in this deed of waiver and relinquishment embraced the whole tract including the village lot and outlot covered by Hunt's certificates. At the date of this deed of relinquishment and waiver, C. resided upon the village lot and cultivated the outlot for which Hunt's certificate had been issued in 1825, but no portion of his improvements extended beyond the boundaries of these lots, except a part of a field, which did extend beyond the lines of said outlot as afterwards surveyed by the United States. After his said relinquishment and waiver and about the 1st of September, 1834, C. made application to the register of the land office at Jackson, Mo., to enter said tract as a preëmtor under the third section of the act of Congress of July 9, 1832. He was not then permitted to make the entry because the public surveys were not then completed. Afterwards, on the 26th of November, 1839, C. was permitted to and did enter, as preëmtor under said act of Congress of July 9, 1832, in conformity with the township and section lines, and their interferences with said tract so relinquished to the United States, various portions thereof, among others a fractional half quarter section in fractional section fifteen, township thirty-seven north, range two east. In 1843, this entry was cancelled by order of the commissioner of the general land office, concurred in by the secretary of the treasury, on the ground that the third section of the act of July 9, 1832, gave the right of preëmption to none but actual settlers and housekeepers on the land sought to be entered; that C. did not bring himself within the provisions of said section, his residence on the village lot and his actual possession and cultivation of the outlot not constituting him an actual settler and housekeeper as to the whole tract claimed. Afterwards, in 1847, one E. entered said land as a preëmtor, and in 1854 obtained a patent therefor from the United States. *Held*, in a suit for possession by E. against C., that the claim of C., as the legal representative of B., to the tract of six hundred and thirty-nine acres was a claim within the meaning of the act of Congress of March 2, 1833; that C. was entitled, under the third section of the act of Congress of July 9, 1832, to relinquish or waive said claim in favor of the United States; that, having made such a waiver or relinquishment, C. had a right, under said third section, to enter said tract as a preëmtor irrespective of the question whether he was an actual settler and housekeeper thereon or not; that the act of the executive officers of the United States in cancelling and annulling C.'s entry was void; that his entry, notwithstanding such cancellation, was valid and binding upon the United States and all persons claiming under the United States by title subsequent, whether by patent or otherwise.

Appeal from Washington Circuit Court.

This was an action in the nature of an action of ejectment, commenced May 4, 1855, to recover possession of a tract of 58 54-100 acres, being the east fractional half of the south-east fractional quarter of fractional section fifteen, township thirty-seven north, range two east, in Washington county. To support his right to a recovery, the plaintiff introduced the evidence taken before the register and the receiver at the land office at Jackson, Mo., in support of his right to a preëmption; also the receipt of the receiver and the certificate of the register. All these were dated July 3, 1847. The plaintiff also adduced in evidence a patent dated May 4, 1854, to himself of the land thus preëmpted. Here the plaintiff closed.

The defendants then introduced in evidence against the objections of plaintiff a transcript from the office of United States recorder of land titles. This transcript contained the following: 1. A notice of claim given by John Perry, sr., to the recorder of land titles. This notice was dated October 3, 1807. In this notice Perry stated that he claimed "as assignee of Bazil Vallé six hundred and thirty-nine acres of land situate at Mine à Breton, in pursuance of the inhabitation and cultivation made on the said land by the said Vallé conformably to the laws of the United States made and provided," &c. 2. A deed from Vallé to John Perry, sr., conveying a tract of land described as follows: "All my right, title and claim to my settlement at said mines, to include the house in which I now live, together with my garden and the lot of ground heretofore improved by me, supposed to be ten acres, more or less, with an out-house annexed to said tenement," &c. This deed purported to be dated March 18, 1806. 3. Minutes of board of commissioners under act of Congress. These minutes were dated December 5, 1807. They showed that Perry appeared before the board and produced the above notice and deed and testimony showing that Vallé had possessed and cultivated said land from 1792 up

O'Brien v. Perry.

to the date of the deed to Perry. The court did not act upon the claim. 4. Minutes of proceedings of commissioners, December 27, 1811. The claim was again presented and the board decided that the claim "ought not to be granted because it appears Basil Vallé claims another tract of land under concession." 5. Minutes of testimony in the form of affidavits submitted to the board of commissioners December 3, 1833, by John Perry as legal representative of Vallé. The board made no order and gave no opinion respecting the same. 6. A deed of relinquishment dated August 7, 1834, executed by John Perry and wife to the United States. In this deed the claim of Vallé, the notice to the recorder, the deed from Vallé to John Perry, sr., a deed dated January 18, 1819, from John Perry, sr., to Wm. M. Perry and John Perry, a deed of release from the heirs of Wm. M. Perry to John Perry, dated December 7, 1825, were recited. After these recitals the deed proceeds as follows: "do hereby—and in consideration of the privilege of preëmption intended to be conferred on us, the party claiming to hold said tract of land, by the provisions of the third section of the act of Congress approved on the 9th of July, 1832, entitled 'An act for the final adjustment of private land claims in Missouri,' and the supplementary act thereunto of March 2, 1833, entitled 'An act supplemental to the act entitled an act for the final adjustment of land claims in Missouri'—forever waive, release, renounce, relinquish and surrender unto the United States of America all the right, title, interest and claim which we, the said John Perry and Eliza M., his wife, allege and assert or believe to have acquired, or had at any time alleged and asserted or belived to have acquired unto the tract above described."

M. Frissell, sworn as a witness, stated, against the objection of plaintiff, that he had seen a plat of a survey made by John Stewart, purporting to be made in 1806, of the tract of land claimed by John Perry under the notice filed with the recorder in 1807; that it included the tract in controversy, also the town lot upon which Perry lived; that he, witness, had

O'Brien v. Perry.

made diligent search for said plat among the papers of John Perry and could not find it; that a store in which Perry kept many papers was destroyed by fire in 1843.

The defendants offered in evidence the report of the register and the receiver of the land office at Jackson, Mo., to the commissioner of the general land office. The report was dated September 16, 1842, and was made upon the claim of Perry to preëmption under the acts of Congress of July 9, 1832, and March 2, 1833. This report recited the following facts: the deed from Vallé; the presentation of the claim of Perry to the board of commissioners agreeably to a plat of survey made by John Stewart (which plat was mentioned in the report as accompanying it); the rejection of the claim by said board; that on the 16th of July, 1825, William and John Perry, claiming under said settlement right acquired of Bazil Vallé, had confirmed to them under the act of June 13, 1812, and May 26, 1824, by the recorder of land titles, a town lot and out-lot in the village of Mine à Breton, which lots were included in the original survey made by Stewart and upon which town lot the dwelling of said Perry is situated; that on the 2d December, 1820, notice of the claim of said Perry was filed in the land office and the land marked out as reserved from sale on the plat on file by red dotted lines; that on the 3d of December, 1833, John Perry, jr., again presented his claim and submitted further testimony to support it; that the board made no decision; that on the 7th of August, 1834, Perry relinquished to the United States in conformity to the plat of Stewart above mentioned; that on or about the 1st of September, 1834, Perry made application to the register to make his entry of said land, but was not permitted to do so because the public surveys were then incomplete; that soon after the completion of the survey, in June, 1836, Perry again made application to enter, but was informed by the land officers that the law by which the right to enter accrued had expired; that Perry then applied to the commissioner of the general land office, who, on the 28th of September, 1839, ordered the entry to be made provided the

O'Brien v. Perry.

officers at the land office at Jackson should be satisfied, from the proof submitted, that he (Perry) was entitled to the benefit of the law under which he claimed; that in pursuance of said order Perry was permitted, on the 26th of November, 1839, to enter; that he clearly established the fact that he was an actual housekeeper and cultivator upon the claim of Bazil Vallé as presented before the board of commissioners; that his dwelling-house and field in cultivation were situated upon the claim as surveyed by Stewart in 1806 and as reserved from sale upon the original plat in the land office. The register and receiver then enter upon an argument to show that Perry had a right of preëmption and that he made his application in time, and that his entry should not be cancelled. The plaintiff objected to the admission of this report on the ground that it was not competent to prove the facts recited in it. The court overruled the objection and admitted the report.

The defendants then introduced in evidence, against the objection of plaintiff, a certified abstract from the office of the register of the land office at Jackson, Mo. From this it appeared that on the 15th of November, 1839, Perry had entered the land in controversy as preëmtor under the act of Congress of July 9, 1832. Upon the face of the abstract the entry was marked as cancelled. Also a letter from the commissioner of the general land office to the register and receiver at the land office at Jackson, dated September 28, 1839. In this letter the commissioner states that if Perry made his application to enter as early as September, 1834, and if the entry had not been made only because of the want of the requisite survey, then Perry should be allowed to enter the same whenever the surveys were returned, if the officers should be satisfied from the proof that he was entitled to the benefit of the law.

The defendants then, without objection, introduced in evidence certificates of confirmation, issued by Recorder Hunt, under the act of May 26, 1824, to William M. Perry and John Perry as representatives of John Perry, sr., for a vil-

made diligent search for said plat among the papers of John Perry and could not find it; that a store in which Perry kept many papers was destroyed by fire in 1843.

The defendants offered in evidence the report of the register and the receiver of the land office at Jackson, Mo., to the commissioner of the general land office. The report was dated September 16, 1842, and was made upon the claim of Perry to preëmption under the acts of Congress of July 9, 1832, and March 2, 1833. This report recited the following facts: the deed from Vallé; the presentation of the claim of Perry to the board of commissioners agreeably to a plat of survey made by John Stewart (which plat was mentioned in the report as accompanying it); the rejection of the claim by said board; that on the 16th of July, 1825, William and John Perry, claiming under said settlement right acquired of Bazil Vallé, had confirmed to them under the act of June 13, 1812, and May 26, 1824, by the recorder of land titles, a town lot and out-lot in the village of Mine à Breton, which lots were included in the original survey made by Stewart and upon which town lot the dwelling of said Perry is situated; that on the 2d December, 1820, notice of the claim of said Perry was filed in the land office and the land marked out as reserved from sale on the plat on file by red dotted lines; that on the 3d of December, 1833, John Perry, jr., again presented his claim and submitted further testimony to support it; that the board made no decision; that on the 7th of August, 1834, Perry relinquished to the United States in conformity to the plat of Stewart above mentioned; that on or about the 1st of September, 1834, Perry made application to the register to make his entry of said land, but was not permitted to do so because the public surveys were then incomplete; that soon after the completion of the survey, in June, 1836, Perry again made application to enter, but was informed by the land officers that the law by which the right to enter accrued had expired; that Perry then applied to the commissioner of the general land office, who, on the 28th of September, 1839, ordered the entry to be made provided the

O'Brien v. Perry.

officers at the land office at Jackson should be satisfied, from the proof submitted, that he (Perry) was entitled to the benefit of the law under which he claimed; that in pursuance of said order Perry was permitted, on the 26th of November, 1839, to enter; that he clearly established the fact that he was an actual housekeeper and cultivator upon the claim of Bazil Vallé as presented before the board of commissioners; that his dwelling-house and field in cultivation were situated upon the claim as surveyed by Stewart in 1806 and as reserved from sale upon the original plat in the land office. The register and receiver then enter upon an argument to show that Perry had a right of preëmption and that he made his application in time, and that his entry should not be cancelled. The plaintiff objected to the admission of this report on the ground that it was not competent to prove the facts recited in it. The court overruled the objection and admitted the report.

The defendants then introduced in evidence, against the objection of plaintiff, a certified abstract from the office of the register of the land office at Jackson, Mo. From this it appeared that on the 15th of November, 1839, Perry had entered the land in controversy as preëmtor under the act of Congress of July 9, 1832. Upon the face of the abstract the entry was marked as cancelled. Also a letter from the commissioner of the general land office to the register and receiver at the land office at Jackson, dated September 28, 1839. In this letter the commissioner states that if Perry made his application to enter as early as September, 1834, and if the entry had not been made only because of the want of the requisite survey, then Perry should be allowed to enter the same whenever the surveys were returned, if the officers should be satisfied from the proof that he was entitled to the benefit of the law.

The defendants then, without objection, introduced in evidence certificates of confirmation, issued by Recorder Hunt, under the act of May 26, 1824, to William M. Perry and John Perry as representatives of John Perry, sr., for a vil-

lage lot in the village of Mine à Breton and for an out-lot of said village containing about fourteen arpens ; also surveys thereof by the United States approved April 17, 1847. It was admitted that John Perry's residence, at the time of his deed of waiver, and before that, and down to the time he left the county of Washington, was on the town lot confirmed to him under Vallé in 1825, and that no part of his improvements extended over the line of his confirmation as surveyed, except part of a field lot, which it was proven did extend over the lines of the confirmed tract and on the tract which he claimed by preëmption.

The defendants here closed. The plaintiff, in rebuttal, introduced in evidence the opinion of the solicitor of the treasury given to the commissioner of the general land office upon the right of John Perry to a preëmption under the act of Congress of July 9, 1832. This opinion was dated January 21, 1843, and was adverse to the claim of Perry. The decision of the commissioner of the general land office was also introduced ; also that of the secretary of the treasury. The ground taken in these opinions and decisions was that the third section of the act of July 9, 1822, gave the right of preëmption only to actual settlers, being housekeepers, on the land sought to be entered, and that Perry was not such settler or housekeeper.

The court found the facts substantially as follows : That John Perry, as assignee of Bazil Vallé, gave notice, October 3, 1847, to the recorder of land titles of his claim to six hundred and thirty-nine acres of land situate at Mine à Breton, in pursuance of the inhabitation and cultivation of said Vallé ; that on the 5th of December, 1807, the claim was presented to the board of commissioners with evidence to support it, but it was not acted upon ; that on the 27th of December, 1811, said claim was again presented and rejected on the ground that it appeared that Vallé claimed another tract under concession ; that in 1825 William Perry, having all the title conveyed by Bazil Vallé to John Perry, sr., obtained certificates of confirmation from Recorder Hunt under

O'Brien v. Perry.

the act of May 26, 1824, for a village lot in Mine à Breton and for an out-lot of two by seven arpens; that on the 3d of December, 1833, John Perry appeared before the board of commissioners and presented his claim for six hundred and thirty-nine acres, and offered evidence in support thereof, but the board did not act thereon; that on the 7th of August, 1834, Perry executed a deed of relinquishment to the United States waiving his claim to a confirmation under Vallé; that John Perry's residence and house where he lived was situate within the boundary lines of the survey of the tract confirmed to him on the 16th of July, 1825; that John Perry, claiming the right of preëmption by virtue of his relinquishment and waiver, was permitted to enter as preëmptor at the land office at Jackson, on the 26th of November, 1839, the tract of land in controversy, which tract was within the boundary lines of the tract of land claimed by Perry and released by him under his deed of waiver; that the entry made by Perry was cancelled by the commissioner of the general land office on the 5th of May, 1843, on the ground that Perry's residence and house being on the land confirmed to him and not on the land he was permitted to enter, he was not entitled to enter said land as a preëmptor; that this decision was concurred in by the secretary of the treasury on the 3d of November, 1843; that on the 3d of July, 1847, the plaintiff in this cause applied at the land office in Jackson, Mo., and made proof of his right to a preëmption on the land in controversy in this suit, and was permitted to enter and did enter the same as a preëmptor, and received his duplicate receipt for the purchase money; that said entry was duly certified to the general land office; that on the 4th day of May, 1854, the land was patented to said John O'Brien; that the defendants are in possession of the land; that the register and receiver at the land office in Jackson made a report to the commissioner of the general land office in relation to the claim of said Perry; that the town lot and the fourteen arpent out-lot and the balance of the six hundred and thirty-nine acres were all connected and included

in a survey made by one Stewart in 1806 and prior to the confirmations in 1825. The court declared as a conclusion of law "that Perry, by virtue of his waiver and relinquishment of his claim as above, became entitled to a preëmption of the land in controversy and that the cancellation of his certificate of entry was an act contrary to law and void." The court gave judgment for defendants.

Noell, for appellant.

I. The plaintiff made out a clear title. The question is, have the defendants made a case sufficient in law to defeat the *prima facie* title of plaintiff. Perry's claim was not one of that class of claims provided for by the act of July 9, 1832. At the dates of the acts of July 9, 1832, and March 2, 1833, Perry had no "unconfirmed claim" that fell within the provisions of said acts. His claim had been confirmed in 1825. He could not make a claim afterwards by nullifying the confirmation and reconveying to the United States. Those acts did not embrace his claim. The board had no authority to examine it, pass upon it, or classify it. He could not have two confirmations, each based upon the same settlement. (19 How. 202; 16 How. 86.)

II. The claim was not reserved from sale by the act of July 9, 1832. No claims were reserved except those classified either in the first or second class. To be reserved after the act expired, it was necessary that it should be classed in the first class. Those not so classed are not reserved. Those waived are not reserved. If Perry's claim was reserved from sale, the act of July 9, 1832, together with Perry's waiver restored it to market. It gave him a preëmption if he brought himself within the provisions of the law as a housekeeper residing on the land, and upon failure to do so the land was open to entry by others. By the waiver all the benefits and privileges of the law of July 9, 1832, were wholly abandoned and gone, excepting the privilege of preëmption. He made his election to take the benefit of the preëmption privilege and on this privilege he rested his whole

O'Brien v. Perry.

case. There is no proof in this case that Perry ever presented to the land office at Jackson his proof of preëmption or his deed of relinquishment. The report of the officer to the commissioner is no legal evidence of that fact, and the court erred in admitting it. If Perry's claim was reserved, it was under the acts of 1811 and 1818, and according to the provisions of these acts Congress has disposed of the claim. It was confirmed in 1825. There was an interruption of reservation from sale from the 29th of May, 1829, to July 9, 1832. Unless Perry's claim was reserved by the act of 1832, it was not reserved at all. (15 How. 525.) There is no evidence in the case that the tract in controversy is embraced in Perry's claim as relinquished by him under the act of 1832. Mr. Frissell's statements do not prove this. Stewart's survey was not made until 1836. The commissioner of the general land office and the secretary of the treasury, in determining the validity of entries, preëmptions and other preliminary questions in reference to the disposal of the public domain, act as judicial officers to that extent, and may determine questions of fact upon evidence and questions of law upon the facts. Their decision, unless superinduced by such fraud as would constitute the fraudulent party a trustee for the party injured, is final. The decision upon Perry's claim concludes him. (18 Howard, 87.) Admitting, what no legal evidence establishes, that Perry's first application was made September, 1834, the act did not expire until some time in 1835. It is nowhere shown that from the first application in 1834 till the expiration of the law the surveys remained incomplete so as to prevent Perry's making the entry during the existence of the law. For all that appears, the surveys may have been completed within ten days after Perry's first application. The points made and decided in the case of *Perry v. O'Hanlon*, 11 Mo. 585, are not the same as those raised in this case. At that time the supreme court of the United States had not decided that all reservations from sale were removed from May 29, 1829, to July 9, 1832. (See *Delaunier v. Emerson*, 15 How. 525.) The

court seems to have taken it for granted that this land was expressly reserved from sale by the act of July 9, 1832. Claims not classed are nowhere reserved. (See *Stoddard v. Chambers*, 8 How. 364.) The most extreme construction of the law in favor of claimants could not maintain a reservation longer than July 4, 1836. The sale to plaintiff was long, subsequent to July 4, 1836. In Perry's case no plat accompanied the notice filed with the recorder in 1807. (See *Menard's heirs v. Massey*, 8 How. 293.) The defendants have failed to show the validity of Perry's entry in 1839; their whole defence must therefore fall. (18 How. 87.)

Frissell and Gantt, for respondents.

SCOTT, Judge, delivered the opinion of the court.

We regard this case as falling within the reasoning of that of *Perry v. O'Hanlon*, 11 Mo. 585. Indeed it is a part of the same transaction. The merits of the controversy are all on the side of the appellees. It is in vain that we seek in the record any reason why, after the claimant under whom the appellees hold had been permitted to prove up his pre-emption and enter the land in suit, as he had a right to do, the officers of the government should have taken it from him and granted it to the appellant on the same terms on which it had been previously conveyed. The United States, it is clear, derived no advantage from the transaction, nor would their interests have been affected by suffering the first entry to remain. Relying on the reasoning in the case to which reference has been made, we will only notice some of the objections which have been urged by the appellant against the correctness of the judgment of the court below.

We premise that the validity of the original claim under which the appellees derive title, and the question whether that claim would or would not have been confirmed, are not involved in this controversy, for it may be conceded that it would not have been confirmed without affecting the judgment to be given. The question is, whether it was a claim

O'Brien v. Perry.

within the meaning of the first section of the act of Congress of March 2, 1833, which was supplemental to the act for the final adjudgment of land claims in Missouri, approved July 9th, 1832. If it was a claim under that act, then, as it was relinquished by the claimant in pursuance to the provisions of the third section of the last named act, it ceased to be subject to the disposition of the officers of the general government, and the land stood reserved for the benefit of him who made the relinquishment; and it is needless to inquire at this day whether the claim was a good one, for, as Congress could give away the land, it could dispose of it on terms.

That this was a claim within the meaning of the first section of the act of March 2, 1833, is evident from its face compared with the words of the law. By this act, the commissioners, appointed under the act of July 5th, 1832, were authorized to consider, decide and report upon every claim to a donation of land in the state of Missouri held by virtue of settlement and cultivation. Now the claim was for land in pursuance to inhabitation and cultivation made thereon conformably to the laws of the United States, and was dated on the 3d of October, 1807. Whether the claim embraced the land in controversy was a question to be determined by the board of commissioners; and, as the claimant, in pursuance to law, waived an investigation of that question and all others, and submitted to pay for a preëmption and did pay for it, his right thereto could not afterwards be annulled by any act of the officers of the government. This was a compromise between him and the government; and, after he had made a relinquishment of his right and paid the purchase money in pursuance to law, the act could not be revoked. Let it be borne in mind that the officers of the government, in annulling the entry, did not base the right to do so on the ground that it had not been made within the time prescribed by law, but because the claimant was not an actual settler. The officers of the United States had admitted that the preëmption had been proved up within the time contemplated by law.

From this view of the subject, it is manifest that there can be nothing in the objections that the claim was not within the first section of the act of July 9th, 1832; that it was unsurveyed; that it had been forfeited; was subject to entry and sale, and might have been sold like any other public land. Even if these objections could affect the claim, on what ground can the appellant avail himself of them, as he did not enter the land until after it had been entered and paid for by the claimant?

We do not feel the weight of the objection, that a portion of the claim was confirmed under the act of 26th May, 1824, by the recorder of land titles. If a portion of a tract of land is confirmed by the terms of a general law—for instance, a village lot, under the act of 13th June, 1812, being a portion of a larger tract, the whole of which is claimed, we will suppose, under the second section of the act of March 3, 1807, respecting claims to land in the territories of Orleans and Louisiana—what is there to prevent a party from prosecuting the remainder of his claim? If Congress will confirm a portion of a claim by one law, and afterwards confirms the rest of it by another law, why should not a party be allowed the benefit of both laws? It has never been considered that a claimant, by availing himself of a confirmation of a part of his tract under one law, thereby made an abandonment of the rest of it, so that he could not claim the benefit of a future law confirming it. In this connection, how unreasonable was it that the officers of the government should hold that, because the portion of the tract on which the claimant was settled was confirmed by one law, therefore he was no actual settler on the portion that was not confirmed; thus making two tracts out of one, because they were confirmed by different acts of Congress! But, as to the objection that the claimant was not an actual settler on the land, it is clear that the instructions contained in the second volume of the work entitled "Public Lands," printed in 1838, by the senate, (pages 749, 750,) show that a claimant, who relinquished his claim, was entitled to a preëmption under the act of

O'Brien v. Perry.

July 9, 1832, although he was not an actual settler. This is the correct interpretation of the act, independently of any instructions, as is obvious from its language.

We do not regard this case as falling within the influence of the principle, that where a patent for land is issued by the officers of the United States, the presumption is that it is valid and passes the legal title. This is well settled law; but the very case on which reliance is placed to support it (*Winter v. Crommelin*, 18 How. 87) gives the qualification of the rule, and maintains that this presumption may be rebutted by showing that the land is not subject to entry and grant. This case is clearly within the qualification of the principle, and presents the question—if one has a claim, and the law proposes to him, that, if he will relinquish it, he shall be entitled to a preëmption on the land claimed, and he accept the proposition, and afterwards the preëmption is allowed and the land entered—whether the entry can be cancelled. In such case, would not the bare relinquishment of the claim place the land beyond the control of the officers of the government so long as the claimant was ready and willing to comply with the terms of the compromise?

It has been before observed, that it was not considered material whether the claim had been reserved or not from sale by any act of Congress, as we deemed it sufficient if it was a claim at the date of the act of March 2, 1833. But in making this concession we did not intend to admit that the claim was of so little merit that it had never received so much consideration from the government as to be reserved from sale. The act of Congress of March 3, 1811, section 10, reserved all tracts of land the claim to which had been duly presented to the recorder of land titles; and the act of February 17, 1818, establishing additional land offices in the territory of Missouri, continued this reservation. In pursuance to instructions framed under this act by the secretary of the treasury, the claim in this case was marked as reserved from sale on the books of the register and receiver at Jackson, in this state. Affirmed; Judge Napton concurring. Judge Richardson gave no opinion.

MILBURN *et al.*, Plaintiffs in Error, v. HARDY, Defendant in Error.

1. The survey of the outboundary line of the town of St. Louis—the plat of which is commonly known as “Map X”—is not conclusive upon persons claiming title under confirmations by virtue of the first section of the act of Congress of June 13, 1812; said act is operative to confirm to individuals common field lots and out-lots as well without as within said outboundary line as established by said survey.
2. The certificates of confirmation issued by Recorder Hunt under the act of Congress of May 26, 1824, are *prima facie* evidence of title by virtue of the act of Congress of June 13, 1812, as against persons claiming by title emanating from the United States in the year 1820.
3. So also surveys by the United States of the lots embraced in the certificates issued by Recorder Hunt under said act of May 26, 1824, are admissible in evidence as against persons claiming by titles acquired from the United States prior to the passage of said act of May 26, 1824.

Error to St. Louis Circuit Court.

This was an action of ejectment brought by William Milburn and others, as commissioners appointed by the St. Louis county court under authority of an act of the general assembly of March 3, 1851, to recover possession of part of fractional section sixteen, in St. Louis township. At the trial, the plaintiffs adduced the following evidences of title: 1. An act of Congress of March 6, 1820, entitled “An act to authorize the people of the Missouri territory to form a constitution and state government, and for the admission of such state into the Union on a footing with the original states, and to prohibit slavery in certain territories.” 2. An ordinance, passed on the 19th of July, 1821, by the representatives of the people of Missouri in convention assembled, declaring the assent of the people of the state of Missouri to certain conditions and provisions of said act of Congress of March 6, 1820. 3. An act of the general assembly of the state of Missouri approved March 3, 1851, entitled “An act to authorize the sale of fractional section sixteen, township forty-five north, range seven east.” 4. An order of the St. Louis county court made April 11, 1851, appointing the

Milburn v. Hardy.

plaintiffs commissioners under said last mentioned act. 5. Field notes of Brown's survey, made in 1818, of fractional section sixteen. 6. An authenticated plat of township forty-five north, range seven east, certified by the surveyor general of Illinois and Missouri, on the 17th of March, 1845, to be a true copy; and an authenticated plat and description of the survey of the outboundary of the town of St. Louis, as established by the surveyor general. 7. It was agreed that the land in controversy lay without the exterior limits of said outboundary survey; also that at the commencement of this suit defendant was in possession of a part of said fractional section sixteen.

The defendant, to maintain the issue on his part, read in evidence the act of Congress of June 13, 1812; also the act of Congress of May 26, 1824. The defendant then offered in evidence the proceedings of recorder Hunt under said act of May 26, 1824, in respect to the claim of Louis Laroche's representatives. The plaintiff objected to the admission of the same and insisted that the same was incompetent; "first, because, in so far as said proceedings can in anywise affect the land now in controversy, the same were had and the proofs therein taken without any notice to the state of Missouri, to the inhabitants of township forty-five, or to the plaintiffs; second, because said proceedings, so far as they affect the land in dispute, were repugnant to the constitution of the United States and of the state of Missouri, and in derogation of the sovereignty of the latter." The court overruled the objection and admitted the proffered evidence. The evidence thus admitted consisted of Hunt's minutes of testimony taken in 1825 under the act of Congress of May 26, 1824, in support of the claim of Louis Laroche's representatives to a lot of one by forty arpens in the Grand Prairie of St. Louis; also an extract from Hunt's list of certificates of confirmation issued under said act. From this it appeared that a certificate of confirmation had been issued to Laroche's legal representatives. The defendant also introduced in evidence an extract duly authenticated, from the list of

confirmations furnished by recorder Hunt to the surveyor general.

The defendant then tendered in evidence a paper purporting to be a survey, duly certified by the surveyor general, of the lot of Louis Laroche's representatives as proved before recorder Hunt in the proceedings just set forth above, being United States survey No. 1665. The plaintiffs objected to the admission of this paper, because, "1. The survey, in manner and form as the same appeared to have been made, was not authorized by law. 2. Said survey embraced the land in controversy, which the United States had absolutely sold and granted to the state of Missouri more than thirty years before the date of such survey." The court overruled the objection and admitted the survey. Said survey was approved May 23, 1857.

The defendant then gave in evidence, without objection, a confirmation certificate issued to Laroche's representatives by Adolph Renard, United States recorder of land titles, on the 3d of September, 1857.

The defendant then offered the deposition of Jacques Noisé to prove that Louis Laroche, prior to December 20, 1803, cultivated the land in controversy as a lot in the Grand Prairie "under circumstances causing the same to be confirmed by the first section of the act of Congress of June 13, 1812." "The plaintiffs objected to the reception of said testimony on the ground that it was not competent for a party claiming under that section to adduce testimony to show that the subject of confirmation was situate beyond the outboundary line established by government." The court overruled the objection and permitted the testimony to be read.

It was admitted by plaintiffs, for the purposes of this suit, that all the title of Louis Laroche or his representatives in the land in dispute had become vested in the defendant, and that said Laroche's claim as separately surveyed covered the same.

The court, of its own motion, gave the following instruction: "By virtue of act of Congress of March 6, 1820, and

Milburn v. Hardy.

the ordinance declaring the assent of the people of the state of Missouri thereto, dated July 19, 1820, whatsoever title the United States may have had in the land described in plaintiffs' petition at the time of the passage of that act, if it be the sixteenth section or a fractional part thereof, passed to and vested in the state of Missouri for the use of schools; and by the act of the legislature of this state, approved March 3, 1851, and the order of the county court read in evidence (if you find that order genuine,) the plaintiffs have the right to sue for said land; and if you find that the defendant, at the commencement of this suit, was in the possession of any portion of said land, you should find for the plaintiffs, unless you believe defendant has shown a better title as hereinafter mentioned. So far as this case is concerned, the defendant admits that at the commencement of this suit he was in the possession of the premises described in the petition, and the plaintiffs admit that whatsoever title to the land in possession of the defendant may have been at any time in Louis Laroche was, at the commencement of this suit, and now is, vested in the defendant." The court then, at the instance of the defendant, gave the following instructions: "1. If the jury find from the evidence that a tract of land, of which the premises in possession of defendant at the commencement of this suit are a part, was cultivated by Louis Laroche prior to December 20, 1803; that said Louis Laroche was, at the time of such cultivation, an inhabitant of the town of St. Louis; that said tract of land was situate in the Grand Prairie, in the neighborhood of said town, and was used by Louis Laroche for the purposes of cultivation, and was one of a series of lots of similar form and character also used by inhabitants of said town for the purposes of cultivation, and lying adjoining to each other in the same general range of lots, then the plaintiffs are not entitled to recover. 2. If the jury find from the evidence that on the 3d day of March, 1825, Louis Laroche designated the lot, of which the premises in possession of the defendant at the commencement of this suit are a part, as being confirmed to

him by the act of Congress of June 13, 1812, entitled 'An act making further provision for settling claims to land in the territory of Missouri,' on the ground of inhabitation, cultivation or possession prior to December 20, 1803, by proving before the recorder of land titles of said territory the fact of his cultivation and possession thereof and the boundaries [and] extent of said lot, and that said recorder did thereupon issue a confirmation certificate for said lot to said Louis Laroche, and furnish the surveyor general of said territory with a list of the lots so proved, in which list was that of the said Laroche, which lot was afterwards surveyed by said surveyor general and the survey thereof approved by him on the 18th of March, 1857, and on the 17th of July, 1857, returned by him to the office of said recorder, who on the first day of August, 1857, issued his certificate of confirmation thereof, then the plaintiffs can not recover in this suit."

The court refused the following instruction prayed by plaintiffs: "1. The jury are instructed that the several matters of proofs adduced by the plaintiffs, if genuine, are effectual to show that the title to the land in dispute was vested in the state of Missouri on the 19th of July, 1820, and that the same title has become vested in the plaintiffs. 2. The jury are further instructed that the proceedings and proofs before recorder Hunt under the act of Congress of May 26, 1824, read in evidence by the defendant, have no force or effect as against the title of the state of Missouri acquired in the year 1820. 3. The jury are further instructed that the survey of the outboundary read in evidence is to be considered by them as the official and authenticated survey of the outboundary directed to be run by the act of Congress of June 13, 1812, binding on all parties claiming a confirmation by force of the first section of said act, and that all the evidence adduced by the defendant to show that the lot of Louis Laroche was situated on the land in controversy outside of the outboundary as marked by such survey ought to be disregarded by the jury." The jury found for defendant.

Milburn v. Hardy.

Field and Bates, for plaintiffs in error. *

Polk, for defendant in error.

NAPTON, Judge, delivered the opinion of the court.

One of the questions presented by this record is, whether the act of 13th June, 1812, confirmed any lot outside of the outboundary directed by that act to be run by the surveyor general; and upon this question it is deemed unnecessary to add any thing to what has already been said in the cases involving this point. (*Milburn v. Hortiz*, 23 Mo. 536; *Tayon v. Hardeman*, 23 Mo. 539; *Schultz v. Lindell*, 24 Mo. 567.)

The only question discussed in this case was the admissibility of the proceedings before the recorder of land titles (Hunt) under the act of 26th May, 1824, and the certificate of his successor (Renard) of a confirmation to Laroche of the lot in controversy under the act of 13th June, 1812, and the survey made by the surveyor general of the United States or under his directions in 1855. This testimony was objected to because it was all made under a law passed subsequent to the consummation of the plaintiffs' title and without any notice to the state of Missouri or the plaintiffs claiming under the state, and because it was repugnant to the constitution of the United States and of this state, and in derogation of the sovereignty of this state.

By the act of 13th June, 1812, the United States was divested of all title to the property described in the first section of that act as confirmed to private claimants. The act was a grant, *proprio vigore*, and the title of each claimant under it was complete at its date, and he could maintain his ejectment upon mere proof of inhabitation, cultivation or possession, without any further or other evidences of title. In 1824, however, Congress, with a view to prevent the embarrassment which claimants under the act of 1812 would necessarily experience from a dependence on the fleeting mem-

* There are no briefs of counsel on file in this cause.—[REF.]

Milburn v. Hardy.

ory and uncertain lives of witnesses, and to furnish to the government also the means of distinguishing the public from the private lots, authorized the recorder of land titles to receive proof from the claimants of their cultivation, inhabitation or possession, and the extent and boundaries of the same, and to issue certificates of confirmation to such persons as made satisfactory proof thereof. It was to promote the convenience of claimants that this act directed them to appear before the recorder within a limited period and make their proofs, so that the recorder could give them certificates of confirmation. Upon these certificates, by an act of the legislature of Missouri, an action of ejectment could be maintained; and, by the decisions of the courts here, they have been held *prima facie* evidence of title in the claimants under the act of 1812 against all the world, and conclusive on the United States and the claimants who accept them. But the act of 1824 also had in view the convenience of the government in procuring a distinct designation of the public property within the towns and villages subject to be reserved for military purposes or to be subsequently appropriated to the use of schools. For this purpose the recorder was directed to furnish his list of confirmations, with their extent and boundaries, to the surveyor, to serve him as a guide in discriminating the private from the public lots, the latter of which he was expressly ordered to survey.

The act of 13th June, 1812, did not contemplate any survey of the private lots, probably on the supposition that they had been already surveyed or designated under the former government, or could be easily distinguished by their occupation or cultivation. But the act of April 29, 1816, expressly required a survey of all confirmations made previous to its passage, as well as all which might thereafter be made. The act of 1824 does not in express terms order a survey of the private lots, perhaps for the reason that the act of 1816 had already directed it; but as the surveyor was, even under the act of 1824, required to distinguish the private from the public lots, and expressly required to survey the latter, it might

Milburn v. Hardy.

be inferred that the performance of the duty expressly enjoined necessarily implied a survey of each class of lots. However this may be, as the act of 1816 undoubtedly gave the authority to survey the private claims, it is not material that such authority should be construed to be a second time conferred upon him by the act of 1824. The practice, it is believed, has been, after the date of the act of 1824, for the surveyor to have the common field lots as well as the commons surveyed, either by virtue of this last named act or the preceding one of 1816; and such surveys have been regarded as legitimate evidence in the courts of this state and the federal courts. A survey of the commons, it is true, was expressly directed by the act of 1824, but it was only in cases where they had not been previously surveyed. If the certificates of confirmation be admissible to prove a title under the act of 1812, we can see no reason for excluding the surveys. Both are made after all interest in the property had passed from the government. It may be conceded that the admission of either is somewhat anomalous in principle, but it has received the sanction of the courts for so great a length of time that to call it in question now would be dangerous to the stability of important interests resting on the faith of their decisions.

There is no distinction between the title to commons and that to field lots or town lots, so far as this question is concerned. A survey of the St. Louis commons, made in 1832, twenty years after the United States had parted with all interest in the land within the survey, has uniformly been received in evidence as *prima facie* proof of the extent and boundaries, not only against the United States but all opposing claimants deriving title therefrom. This practice has received the sanction of the supreme court of the United States in several cases.

In the case of Jones, adm'r, v. Gurno, 6 Mo. 330—a case decided nearly twenty years ago—the same positions now assumed in opposition to the admissibility of this kind of testimony under the act of 1824 were taken by Mr. Geyer and

Milburn v. Hardy.

fully discussed, and, I need hardly add, with great ability. It was urged then, as now, that this evidence was *ex parte* in its character, and was not designed to, and could not, in its nature, affect private claimants, however conclusive it might be on the government, and that the United States could not invest one of their subordinate executive officers in Missouri with quasi judicial functions to pass upon the validity and fix the locality of titles which had years before entirely passed from that government, and on which it had ceased to have any control. But the court considered the matter *then* as *res adjudicata* — Judge Tompkins, indeed, further maintaining that these certificates were not merely *prima facie* but conclusive evidence upon all parties concerned. This, too, it will be observed, was in case where the certificate of confirmation given by recorder Hunt was used against a title emanating from the same act of 1812. So, in *Soulard v. Allen*, 18 Mo. 595, the certificate was used against a title originating under the act of 1816. The adverse titles in both cases, against which the certificates were used, had their inception and consummation prior to the act of 1824, under which the evidence was taken.

It is plain that the certificates of confirmation and surveys under the act of 1824 can avail nothing unless they are allowed to show title in 1812. They do not purport to do any thing else. They do not profess to grant land at their date or to certify that land was granted at their date, but that the confirmations were made in 1812 and by virtue of the act of 13th June of that year. They must therefore either be admitted to prove that, or go for nothing.

As the plaintiff in this case offered no evidence in rebuttal of the *prima facie* case made out by the defendant, the instructions given by the court were proper. The evidence being *prima facie*, was of course conclusive in the absence of any proof to the contrary.

The judgment is affirmed; the other judges concur.

Milburn v. Carpenter.—Milburn v. Hortiz.

MILBURN *et al.*, Plaintiffs in Error, v. CARPENTER, Defendants in Error.

MILBURN *et al.*, Plaintiffs in Error, v. BLANCHARD, Defendant in Error.

MILBURN *et al.*, Plaintiffs in Error, v. MCCLURE, Defendant in Error.

MILBURN *et al.*, Plaintiffs in Error, v. HOGAN, Defendant in Error.

1. Milburn v. Hardy, ante p. 514, affirmed.

Error to St. Louis Circuit Court.

NAPTON, Judge, delivered the opinion of the court.

These cases all involve precisely the same questions determined in the case of Milburn and others v. Hardy, at the present term. The judgments are consequently affirmed.



MILBURN *et al.*, Plaintiffs in Error, v. HORTIZ, Defendant in Error.

1. The survey of the outboundary line of the town of St. Louis—the plat of which is commonly known as “Map X”—is not conclusive upon persons claiming title under confirmations by virtue of the first section of the act of Congress of June 13, 1812; said act is operative to confirm to individuals common field lots and outlots as well without as within the said outboundary line as established by said survey.

Error to St. Louis Land Court.

Bates and Field, for plaintiffs in error.

Todd and Morehead, for defendant in error.

NAPTON, Judge, delivered the opinion of the court.

The record in this case presents the single point touching the conclusiveness of the outboundary survey against any proof of common field lots, not embraced within it, and the case will therefore be disposed of in conformity to previous decisions on this point. The judgment is affirmed.

[END OF MARCH TERM.]

CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI,
JULY TERM, 1859, AT JEFFERSON CITY.

DUNNICA, Respondent, v. COY *et al.*, Appellants.

1. Where a party purchasing land causes the legal title to be placed in a third person with a view to defraud his creditors, there will be a resulting trust to himself for the benefit of such creditors, and this interest may be seized and sold on execution under a judgment against him in favor of one of those creditors; the purchaser may then, in a proceeding for that purpose, and upon establishing the alleged fraud, have a decree vesting the legal title in himself and for the possession of the land.
2. Where a sheriff receives a writ of execution and does not levy the same during his term of office, it is his duty, at the expiration of his term, to deliver said writ to his successor in office, whose duty it is to receive and execute the same.

Appeal from Chariton Circuit Court.

This was an action in the nature of a suit in equity. The plaintiff is William F. Dunnica; the defendants are John Coy, Elizabeth Coy, Collins Coy, and John Prewitt. The plaintiff in his petition alleged substantially as follows: that John Coy, while insolvent and indebted to plaintiff and other persons, acquired an interest in certain slaves; that, to de-

Dunnica v. Coy.

fraud his creditors, he sold said interest to his brother Collins Coy and received in exchange certain land; that, in order to defraud, hinder and delay his creditors, he caused said Collins Coy to make a title bond for the land to John Prewitt for the use of Elizabeth Coy, wife of said John Coy, and her children; that Collins Coy was privy to the fraud; that John Coy was afterwards put in possession of said land; that plaintiff obtained judgment against John Coy for his debt, and levied on and sold John Coy's interest in said land, and became the purchaser himself and received a deed from the sheriff therefor. Plaintiff prays that the contract with Prewitt be set aside; that Collins Coy be required to convey said land to plaintiffs upon the payment of the balance of the purchase money.

Collins Coy alone answered. The sheriff's deed mentioned in the petition was admitted in evidence against the objection of defendant, Collins Coy. The objection taken was that the successor of the sheriff who made the levy was not authorized to make the sale and execute the deed. This deed on its recitals are sufficiently set forth below in the opinion of the court. The court decreed title in plaintiff on the payment of the balance of the purchase money; also gave judgment for possession.

Turner, for appellant.

I. If the exchange of John Coy's interest in the slaves for the land was fraudulent and void as to creditors, the title remained as before unaffected by this void transaction. A creditor in whose favor the contract is declared void can only subject to the payment of his debt the part of the property that would have been subject thereto had the exchange not been made. It would be unjust to let this creditor take the land and leave the others at liberty to take the slaves. (27 Mo. 167.) Besides, there was no proof of the alleged fraud. The failure of the other defendants to answer did not, as against Collins Coy, obviate the necessity of such proof. John Coy's supposed interest was divested by the sheriff's

Dunnica v. Coy.

sale, and the interest of Mrs. Coy and Prewitt by the cancellation of the title bond. Their admissions would not be evidence against Collins Coy. (1 Stark. Ev. 332; 9 Cranch, 153; 1 Greenl. Ev. § 178.) Further, there was no lawful sheriff's sale and conveyance. Only the sheriff that levied the execution was authorized to make the sale. Executions that are *levied* are not unexecuted. (See 6 Monr. 32.)

Shackelford, for respondent.

I. Collins was cognizant of the fraud. It is unimportant whether he was or not. (See Rankin v. Harper, 23 Mo. 579; Dunnica v. Coy, 24 Mo. 167.) The sheriff's deed is valid. (See 1 Monroe, 94; 3 Monr. 272; 4 Monr. 465; 13 Pick. 477.)

RICHARDSON, Judge, delivered the opinion of the court.

It is recited, in the sheriff's deed under which the plaintiff claims, that the execution was issued on the first day of April, 1854, directed to the sheriff of Chariton county, and delivered to Henry H. Davis, who was at that time sheriff of the county; that Davis levied the writ on the land in controversy, but that Robertson Moore, the successor in office of Davis, advertised the land for sale, conducted the sale, and made the deed to the plaintiff. The defendant insists that the deed is void for the reason that the execution was delivered to and levied by one sheriff, and the sale was made by his successor.

It does not appear how the sheriff, who first received the writ, had levied it. He did not advertise the land for sale; and as he was not required to make an actual or symbolical seizure of it, (Wood v. Colvin, 5 Hill, 228,) it is difficult to perceive how he had made a levy at all; and it may be inferred from the circumstances that he did nothing more than indorse on the writ that he had levied it on the land in dispute. The writ, then, was not executed within the meaning of the statute, but was in a condition that authorized the sheriff, who received it, to deliver it to his successor, as pro-

Wood v. Squires.

vided by the fifty-second section of the execution law of 1845, which declares that "whenever the term of office for which any sheriff shall have been elected has expired, or he shall have resigned or removed without the county, or be removed from office, it shall be his duty to deliver over all writs of execution *not executed* to such person as may have been elected, or appointed, and qualified to discharge the duties of sheriff; and such new sheriff shall receive all such writs and proceed to execute the same in the same manner as if such writs had been originally directed to him."

The right of the plaintiff to recover upon proof of the allegations in his petition was established by the principle decided in the case of Rankin v. Harper, 23 Mo. 579; and we think the evidence was sufficient to warrant the decree. The judgment will therefore be affirmed, the other judges concurring.

WOOD *et al.*, Appellants, v. SQUIRES, Respondent.

1. If the plaintiff in an attachment suit file an insufficient bond, he has the right to file another.
2. In an attachment suit commenced in the names of the members of the firm of "Wood, Bacon & Co.," the attachment bond purported to be the bond of "Wood, Bacon & Co." as principals and "Northup & Co." as securities, and was signed thus—"Wood, Bacon & Co. [seal], by their attorney, P. S. Brown [seal]; Northup & Co., by H. M. Northup [seal]"—*held*, that the attachment bond was not a nullity and should not be treated as such.

Appeal from Kansas City Court of Common Pleas.

This was a suit by attachment brought by Richard D. Wood and others, members of the partnership firm of "Wood, Bacon & Co." The attachment bond commenced thus: "We, 'Wood, Bacon & Co.,' by our attorney, P. S. Brown, as principal, and 'Northup & Co.' as securities, acknowledge," &c. It was signed as follows: "Wood, Bacon & Co. [seal], by their attorney, P. L. Brown [seal]; Northup

Wood v. Squires.

& Co., by H. M. Northup [seal]." Squires, the defendant, moved the court "to dismiss the attachment" because no such bond had been filed as is required by law. The next day after this motion was filed, the plaintiffs filed another attachment bond, which was approved by the court. The court afterwards sustained the motion of defendant and dismissed the suit.

Hovey, for appellants.

I. The first bond was a good one ; it was at least the bond of P. S. Brown as principal, and H. M. Northup as security. (3 Johns. Cas. 307 ; 13 Johns. 306 ; 2 Greenl. R. 358 ; 9 N. H. 55 ; Story on Agency, p. 339.) Northup was bound. Whether the bond was sufficient or not, it was amendable. It was amended, and a satisfactory bond filed.

Bolling, for respondent.

I. A bond executed by the plaintiffs, or some one for them, and one or more securities, was necessary. The bond filed in this suit was not executed by the plaintiffs or any one else as principal. It is not pretended that Brown had authority under seal. It was not the bond of Brown.

RICHARDSON, Judge, delivered the opinion of the court.

The day after the defendant filed his motion to dismiss the suit and dissolve the attachment because the first bond was insufficient, but before it was disposed of, the plaintiff filed another bond, which was approved by the court ; and, at that stage of the proceedings, the court erred in afterwards sustaining the motion. The first bond was not a nullity, and the ninth section of the attachment law permits the plaintiff to file a second bond, when the first is insufficient, or the surety therein has died or removed from the state, or has become or is likely to become insolvent. (R. C. 1855, p. 242, § 9 ; Vanandale v. Krum, 9 Mo. 397 ; Tevis v. Hughes, 10 Mo. 380.)

The other judges concurring, the judgment will be reversed and the cause remanded.

THE STATE, Respondent, v. MARTIN, Appellant.

1. A. was indicted for stealing certain cattle alleged in the indictment to be the property of B. At the trial, one C., who had been summoned as a juror, stated, upon his *voir dire*, that he knew the cattle alleged to have been stolen; that his brother had once owned them, and had sold them to one K., who had sold them to B. *Held*—the allegation as to B.'s ownership not being controverted—that C. was a competent juror.
2. Although cattle may have wandered away from the owner's enclosure, and the owner may not know where they are, yet if another coming across them drives them off and converts them feloniously to his own use, he is none the less guilty of larceny because he is ignorant of their true owner and their owner may not know where they are; the ownership draws along with it the possession under such circumstances.
3. Hearsay testimony is inadmissible in evidence.
4. Where declarations or statements made by an accused person are admitted in evidence against him, he has a right to insist that the whole of his statements and not a portion merely shall go before a jury; what credit shall be attached to the whole, or any part thereof, is a matter exclusively for the jury.

Appeal from Benton Circuit Court.

This was an indictment for grand larceny. The indictment charged the defendant, William Z. Martin, with feloniously stealing two oxen, the property of Stephen L. Cheatham. The court gave the following instructions at the instance of the prosecution: "1. If the jury believe from the evidence that said Cheatham was the owner and possessed of the cattle mentioned in the indictment, and that defendant knowingly took and drove them away, in Benton county, against the consent of said owner, without any claim of right, and with the intent to deprive said owner of them and to convert and appropriate them to his own use, and thereby to defraud said owner of them, they will find him guilty. 2. If the jury believe from the evidence that said Cheatham was the owner of the cattle and that they strayed away from him and went to Mr. Baker's, and while they were at Baker's and at the time defendant took and drove them away (if he did so) said Cheatham was still the owner of them, then the said ownership drew to said Cheatham the

possession, and the defendant is not the less guilty from the fact of having taken them at said Baker's, nor from the mere fact of their having so strayed away, if the facts otherwise fix his guilt."

The court gave certain instructions asked by defendant, but refused the following: "7. If the jury shall believe from the evidence that the cattle had strayed away from Cheatham before he moved away from the place the cattle strayed from, and that Cheatham afterwards moved six or seven miles from that place, and that Cheatham did not know where they were, yet, although the defendant may have been the person who took the cattle, it was not a felonious taking of the cattle from Cheatham's possession. 8. Whenever the declarations of the defendant are given in evidence to establish a fact against him, and his declarations when proved tend to prove a fact in his favor, whatever he said in his own favor should be taken as true unless it is disproved by other evidence in the cause. 9. If the jury shall believe from the evidence that the cattle strayed away from Cheatham, and he did not know where they were, and that they were running about the premises of the witness Baker, and that it was not known who was the owner of them, and that there were no marks about them so that the owner could be known, they were lost property within the meaning of the law. 10. If the jury shall believe from the evidence that Cheatham lost the cattle out of his possession and that defendant found them and did not know the owner of the same, and, believing that they were lost, took them openly in the day time, they should acquit him. 11. If the jury shall find from the evidence that the cattle had been lost out of the possession of Cheatham for a considerable length of time, the defendant is not required to prove how he came into the possession of the property to disprove any presumption of guilt."

Johnson & Ballow, for appellant.

I. The court erred in determining that Gallaher was a

State v. Martin.

competent juror. He had formed an opinion on a material fact to be tried. He *knew* the cattle to be Cheatham's.

II. The court erred in refusing to admit the testimony as to Kendrick's admissions; also in giving the second instruction asked by the state. (See *State v. Conway*, 18 Mo. 321.) The instruction was calculated to mislead the jury. The property had strayed away; it was lost to the owner. (3 Chitt. C. L. 916.) The court should have given the seventh instruction asked by defendant. Defendant could not be convicted of grand larceny for taking stray cattle. He could only be indicted under the act concerning strays. (R. C. 1855, p. 1511, § 33, 34.) At most he could only be indicted under section fifty of article three of the act concerning crimes and punishments, (R. C. 1855, p. 582,) or under the act concerning strays. The court should have given the eighth instruction. (1 Greenl. Ev. § 218; 2 Carr. & Pag. 629.) The court should have given the ninth and tenth instructions. (18 Mo. 321.) So also the eleventh. Cheatham had lost the cattle. They had been out of Cheatham's possession at least three months before they were found in Martin's. (See 15 Mo. 168; 12 Ill. 259.) The court should have sustained the motion in arrest. The property is not described in the language of the statute.

Ewing, (attorney general,) for the State.

I. Gallaher was a competent juror. When a juror qualifies himself under the statute and the court below accepts him, this court can not say error was committed. (*Baldwin v. State*, 12 Mo. 226.) There was no error in excluding the testimony as to one Hendrick's admissions. The instructions given presented the law arising upon the facts properly to the jury. (2 Har. 530; Whart. 651; 2 Tyler, 399, 387.) Our statute concerning lost property would seem not to apply to domestic animals. Such animals when strayed are not considered as lost. The seventh instruction asked by defendant was properly refused. It withdrew from the jury the question of felonious intent, and restricted the issue to

the single question of knowledge on the part of Cheatham as to where the cattle were when taken by defendant. The penalty in the thirty-third and thirty-fourth sections of the stray law is cumulative, and for an offence not amounting to larceny. The penalty is for a conversion of the stray after it has been taken up and posted. There could be no larceny in such a case, because the original taking and possession were lawful. The eighth instruction was properly refused. (Wharton C. L. 320; 9 Leigh, 635.) So the ninth and tenth instructions were properly refused, for the reasons that rendered it proper to give the second instruction. The indictment is sufficient. (22 Mo. 453.)

NAPTON, Judge, delivered the opinion of the court.

The first point presented by the record relates to the competency of the juror Gallaher, who, upon his *voir dire*, stated that he knew the cattle alleged to have been stolen; that his brother had once owned them and had sold them to a man named Kerr, who had subsequently sold them to Cheatham, the person alleged in the indictment to be their owner. This juror the court declared competent, and the defendant was compelled to get rid of him by a peremptory challenge, so that, although the juror did not sit in the case, the question of his competency may be considered as fairly before this court, seeing that the circuit court deprived the accused of one peremptory challenge to which he was entitled if the juror be held incompetent.

Our statute provides that "it shall be a good cause of challenge to a juror, that he has formed or delivered an opinion upon the issue, or any material fact, to be tried." (R. C. 1855, p. 1191.) No question has heretofore arisen upon the construction of this provision of our criminal practice act; nor have we observed any case in any other state, where similar statutes have been passed upon by their courts. Ordinarily, there can not be much practical difficulty in enforcing what seems to be the spirit and object of the provision, which is to secure impartial juries; and when questions of

doubtful character arise, the courts of criminal jurisdiction—as a matter of convenience and precaution, and with a view to avoid the possibility of subjecting the state to unnecessary cost, as well to secure to the accused every reasonable satisfaction in selecting his triers—would usually set aside persons of questionable competency, when a bystander could be called in without delay, who would be unexceptionable to all parties. It is probably because of this practice on the circuits—and a very commendable one, too—that no cases of this sort have ever come up to this court. We will, of course, not be understood as casting any censure upon the court, which tried this case, for not avoiding the question presented here by calling up another juror; for there may have been very good reasons, which influenced the action of the court, not at all apparent to this court on the record. We merely allude to the usual practice on the circuits as the probable reason why such questions have never reached this court.

The general object of the law under consideration is undoubtedly to secure impartial juries. To what extent, however, it was intended to embrace allegations in indictments, which are formally necessary and which are in some sense material to be made and proved, is a matter of some embarrassment. There must, we think, be some qualification placed upon the term “material,” to enable justice to be administered without great inconvenience. What that qualification ought to be, and what class and character of allegations of facts may be considered immaterial within the proper meaning of the statute, is not so easy to define. It is more easy to decide cases as they arise than to lay down in terms any fixed or clear rule to govern all which may occur. Venue is necessary to be laid and proved in every indictment for crime. It is material to the prosecution to establish that the crime alleged was committed at a place within the county, for this is essential to the jurisdiction of the court. Does the knowledge that the alleged locality of an offence is within the county named in the indictment disqual-

State v. Martin.

ify a juror from sitting on the case? We see at once that this fact, material as it undoubtedly is to the success of the prosecution, has no connexion whatever with the guilt or innocence of the party accused, and that it is a fact known probably to nine-tenths of the inhabitants of the county, and therefore in all probability will not be controverted on the trial. In an indictment for murder, the fact of the killing is an essential of crime; but would a man, who accidentally was present at the burial of the murdered person and saw his dead body, and knew him when alive, be excluded as an incompetent juror on the trial of the supposed manslayer? Such facts as we have referred to are material in one sense. They constitute the basis of the prosecution; but they are independent facts, having no bearing on the question to be tried of the guilt or innocence of the accused. They are just as consistent with the guilt of any other person as they would be with the guilt of the accused; and their establishment does not make a single step toward a conviction. If these facts are controverted facts, it may be that a person who has formed an opinion upon them ought to be excluded from sitting on the jury; but, where they have no bearing on the guilt of the accused and are likewise not controverted on the trial, it is plain that the juror is, in every material respect, impartial and competent.

In the present case it is sufficient to decide the point presented, without undertaking to lay down a general rule by which the materiality of all issues are to be tested. The juror Gallaher had simply a knowledge of the identity of the cattle alleged to have been stolen. He also knew or believed they had at one time belonged to Cheatham, the person in whom the property was laid in the indictment. Whether Cheatham owned the property at the time of the taking or of the trial, it does not appear that the juror had any information. But if it had so appeared, the question would not be materially changed; for this court is not called upon, as the circuit court was, to pass upon the competency of Gallaher without any information as to what issues would be

State v. Martin.

controverted in the cause, except such as was furnished by the pleadings; but we are called upon, after the trial and verdict and with the record of all the proceedings before us, to say whether the decision of Gallaher's admissibility on the jury was in any way prejudicial to the accused. The fact of the ownership of the cattle by Cheatham, as the record shows, was not a controverted fact upon the trial. There was no dispute about it. If it had been controverted, it was not a fact which had any connexion whatever with his guilt or innocence, although its successful contradiction might have defeated this particular prosecution. Whether the cattle belonged to Cheatham, or to any one else than the defendant himself, was in truth nowise material. It was larceny in the defendant, if the other facts and circumstances in the case so made it out; and the only effect of disproving it was to turn the accused round to another prosecution. But, in this case, the fact was not controverted, and as it had no connexion with the guilt of the accused, which was the issue tried by the jury, we think that Gallaher's competency can not now be disputed; or, in other words, that the decision of the circuit court, declaring him to be competent, affords no ground for reversing the judgment.

The principal ground of defence upon the trial of this case was, that the cattle alleged to have been stolen were not in the possession of the owner, but were estrays; that the owner did not know where they were; that there were no marks or brands upon them by which a stranger could ascertain their ownership; that, in short, they were *lost goods*, and no larceny could be committed by the finder's converting them to his own use. A variety of instructions were asked by the defendant, the object of which was to assert this position; but they were all refused by the court; and the law laid down to the jury by the court was, that the ownership drew along with it the possession so as to make the defendant responsible for stealing if the other circumstances in proof would justify such a conclusion. And this view of the law we take to be the correct one. In East's Criminal Law it is

declared that "where one finds a purse in the highway, which he takes and carries away, it is no felony, although it may be attended with all those circumstances which usually prove a taking with a felonious intent, such as denying or secreting it." (2 East C. L. 99.) The authority, however, qualifies this doctrine so far as to add that he must be understood as speaking of a finder who really believes the goods have been lost by the true owner, and does not color a felonious taking under a mere pretence. He therefore concludes that, where a man's goods are in a place where ordinarily they are, the pretence of finding will not excuse the person converting them to his use.

Without undertaking to say how far this doctrine about lost goods is to be taken as it is laid down in the old books, we dismiss any further consideration of it as inapplicable to this case. Whatever may be the law concerning domestic animals, such as horses and cattle, in England, we do not consider the doctrine of the English criminal lawyers concerning lost goods as applicable to domestic animals in Missouri. It is with no propriety, either in view of custom or statutory law, that animals can be called *lost goods* here simply because they are outside of the owner's enclosures and the owner does not know where they are. Such animals are not *lost* in the proper sense of the term; nor can the person, who comes across them and feloniously appropriates them to his own use, with any propriety be called the *finder*, as he might be if he, with the same felonious intent, picked up a purse upon the highway. A person does not lose the possession of his horses or cattle here because they may happen to be outside of his enclosures and he may not be able at any given time to lay his hands upon them. They are still in his possession, as much as though they were in his stable or pasture. Nor can it make any difference that they have gone five or ten miles from their ordinary range. The owner is as entirely ignorant of their precise position in the former as in the latter case; and the fact that they are branded or not branded with the owner's name is perfectly

immaterial. It is sufficient for the person who comes across them to know that they are not his property; and if he drives them off and converts them feloniously to his own use, he is as much guilty of larceny, when he is ignorant of their true owner and their owner is ignorant of where they are, as he would be if both he and the owner had full knowledge on both these points.

Our statute in relation to lost money and goods has no relation to criminal law. It is merely a mode pointed out by which the ownership in such property may be changed, and imposes certain duties upon the finder of the property, which may be discharged or neglected without involving any criminal imputation. The same observation will apply to our stray laws. They have nothing to do with the criminal law, and are merely directory, to promote commerce and afford facilities for the reclamation of stray animals.

The testimony offered by the defence in this case, that one Hendricks admitted he had sold a yoke of oxen to defendant, was properly excluded by the court, because it was hearsay. Hendricks himself should have been called.

Instruction No. 8 was properly refused. That instruction is in these words: "Whenever the declarations of the defendant are given in evidence to establish a fact against him, and his declarations, when proved, tend to prove a fact in his favor, whatever he said in his own favor should be taken as true unless it is disproved by other evidence in the cause." This instruction asserts principles altogether at variance with the established rules of evidence. A party has a right to insist upon the whole of his statements going before a jury, if any portion of them is offered against him, but whether the whole or any part of them will be or ought to be credited by the jury is a matter for the jury exclusively. They may be intrinsically unworthy of credit, or be discredited by other testimony, or the reverse; but there is no iron rule to be laid down for the guidance of the jury as to what they will believe or what they will not believe. The jury are to judge of the matter and not the court.

Sone v. Palmer.

The fiftieth section of the third article of the act concerning crimes and punishments had nothing to do with this case. There was no pretence that the defendant had posted the oxen. The question as to the intent in taking the cattle was submitted to the jury upon instructions fully explaining the law of larceny, and enabling them very easily to distinguish a mere neglect of the stray law from a felonious conversion.

Judgment affirmed; the other judges concurring.



SONE, Plaintiff in Error, v. PALMER, Defendant in Error.

1. If a plaintiff voluntarily suffers a nonsuit before the court has made any ruling prejudicial to him, the supreme court will not interfere.
2. To render an assignment of a patent right or of an undivided part thereof valid, it is not necessary that it should be recorded in the United States patent office; the assignee will have a vendible interest without such record.
3. A clerk in the patent office, whose employment consists chiefly in making examinations in relation to assignments and other papers recorded and filed in the office, is a competent witness to prove what documents are of record or on file in said patent office.
4. Where a party relies upon an instrument purporting to have been executed by an agent, he must prove the agent's authority.

Error to Moniteau Circuit Court.

This was an action commenced before a justice of the peace on a promissory note for one hundred and fifty dollars, dated October 5, 1855. At the trial the plaintiff read in evidence the note and rested. The defendant then offered to read the deposition of one William F. Hall, taken in Washington city. In this deposition Hall stated that he was then a clerk in the United States patent office; that his business in the office was chiefly to make searches and examinations in relation to assignments and other papers recorded and on file in said office; that he had carefully examined the records of assignments of patents and found no assignment to L. D. Sone of record prior or subsequent to October 5, 1855,

Sone v. Palmer.

of a patent to Moses D. Wells, December 14, 1852. The plaintiff objected to the reading of this deposition on the ground that it did not appear that said Hall was the keeper of the records in the patent office or that he had access to all the records of assignments of patent rights. The court overruled the objection and admitted the deposition. The defendant then read in evidence two deeds—one dated October 2, 1855, the other October 5, 1855. By these deeds plaintiff Sone assigned to defendant Palmer the exclusive right to vend Wells' seed planter in certain counties in the state of Missouri. In these deeds there were recitals of assignments duly recorded in the patent office from Moses D. Wells to Alpheus Wells, and from the latter to Isaac Scott. The plaintiff then offered, as appears from the bill of exceptions, "to read in evidence a certain deed to him dated March, 1855, conveying to said Sone, by one J. M. Leach for Isaac Scott, the right to sell said patent in said counties." This deed was excluded on the objection of defendant. The plaintiff thereupon suffered a nonsuit, with leave, &c.

Batte and White, for plaintiff in error.

I. The court erred in permitting the deposition of Hall to be read. It was not the best evidence the nature of the case would admit of. He was only an employee in the patent office. It does not appear who employed him. It does not appear that he was there by authority of law; that he had access to all the records of assignments, or that he was keeper of the records of assignments in said office. (7 Pet. 685; 1 Greenl. Ev. 485.) The court erred in excluding the deed from Scott. It was competent for the plaintiff to show what sort of a title he conveyed to defendant. Plaintiff could show that even if there was an irregularity in the conveyance to plaintiff, yet that defendant was aware of the irregularity at the time of his purchase. The deeds contained no covenants of warranty. They only purport to convey the interest that Sone had in the counties mentioned. It is not pretended that any false or fraudulent representations were

Sone v. Palmer.

made to defendant, or that Sone had sold to any one else, or that defendant has been in any way molested or hindered in the enjoyment of the rights acquired by him under the deed. (16 Mo. 411 ; 21 Mo. 338.) It was improper for the court to hear any evidence as to whether one deed had been recorded in thirty days from its execution. The assignment was not void for want of record.

Parsons, for defendant in error.

I. The deposition of Hall was properly admitted.

II. The deed of assignment offered in evidence by plaintiff was properly excluded. What authority Leach had to assign any right of Scott does not appear.

RICHARDSON, Judge, delivered the opinion of the court.

There is nothing in the record that discloses the consideration of the note sued upon ; but it is conceded by the counsel that it was executed in consideration of an assignment, by the plaintiff to the defendant, of the right under the patent to Moses D. Wells for his seed planter for a specified district in this state. The defendant, erroneously assuming the law to be that the plaintiff had no vendible interest in the patent because he had failed to have the assignment to him recorded in the patent office at Washington, rested his defence upon simply proving that there was no record in the patent office of an assignment to the plaintiff. All the evidence introduced by the defendant did not tend to make out his defence and amounted to nothing ; but, although it was admitted, we see no reason why the plaintiff voluntarily suffered a nonsuit. The court had not instructed the jury on any question of law, and had not improperly ruled any point in the case to his prejudice ; and this court will not interfere when parties voluntarily suffer nonsuits before any improper decision hurtful to their case has been made. (*Schutler's Adm'r v. Beckwinkle's Adm'r*, 19 Mo. 647.)

The eleventh section of the act of Congress of 1836, chap.

Sone v. Palmer.

357, provides that every patent shall be assignable, either as to the whole interest, or any undivided part thereof, by any instrument in writing; which assignment—and also every grant and conveyance of an exclusive right under any patent to make and use, and to grant to others to make and use, the thing patented within and throughout any specified portion of the United States—shall be recorded in the patent office within three months from the execution thereof. But it is not declared that the assignment, if not recorded, shall be void; and it is held that the recording of an assignment is not indispensable to its validity, and that the statute is merely directory, for the protection of *bona fide* purchasers without notice. (Brooks v. Bryan, 2 Story, 526; Pitts v. Whitman, id. 614.)

The only objection taken by the plaintiff to the reading of Hall's deposition was that it did not appear he was the keeper of the records in the patent office. But the witness testified that he was a clerk in the office, and that his employment consisted chiefly in making examinations in relation to assignments and other papers recorded and filed in the office; and we think he was quite as competent to prove what documents were in the office as the head of the bureau.

The assignment to the plaintiff from Scott is not contained in the bill of exceptions, but it is stated that it purports to have been executed by J. M. Leach for Scott. As the defendant had made no case, it was unnecessary for the plaintiff to offer any rebutting evidence; but as he chose to present a paper purporting on its face to have been executed by an agent, the court properly required him to produce the agent's authority.

The other judges concurring, the judgment will be affirmed.

Willis v. City of Boonville.

WILLIS, Plaintiff in Error, v. CITY OF BOONVILLE, Defendant in Error.

1. The mayor and board of councilmen of the city of Boonville have power, under the charter of said city, by ordinance to provide for "licensing, taxing and regulating auctions;" they may prohibit persons from exercising the business of auctioneers without license by such fines and penalties as they may think proper, although the same should exceed ninety dollars.
2. The mayor of the city of Boonville has jurisdiction over all cases arising under the charter and the ordinances of said city, although they should involve the assessment of a fine or penalty exceeding ninety dollars.

Error to Cooper Circuit Court.

This was an action in the nature of an action for money had and received against the city of Boonville by the corporate name and style of the "Mayor, councilmen and citizens of the city of Boonville." The plaintiff was arrested under a warrant by a constable of the city of Boonville for a violation of an ordinance of said city in relation to auctions, approved May 10, 1845. The following is the third section of said ordinance: "Sec. 3. Every person who shall exercise the trade or business of an auctioneer, by selling any goods or other property subject to a tax by law of this state regulating auctioneers, without a license, shall forfeit and pay to the use of the city, for every sale, not less than one hundred dollars, to be collected as other fines." The plaintiff was taken by the constable before the mayor, who imposed a fine of one hundred dollars. The mayor made out a fee bill for the amount of the fine and costs and handed it to the constable. The plaintiff paid said fine and costs, amounting to the sum of one hundred and four dollars and sixty cents. No execution was issued by the mayor. The circuit court admitted in evidence, against the objection of plaintiff, a transcript of the docket of the mayor, which stated that Willis, the plaintiff in this suit, confessed his guilt.

The court, at the instance of the defendant, gave the fol-

Willis v. City of Boonville.

lowing instruction: "1. If the jury believe from the evidence that the sum of one hundred and four dollars and sixty cents sued for by plaintiff is the amount of a certain fine or penalty imposed by the mayor of the city of Boonville on defendant for an alleged violation of an ordinance of said city; that defendant had legal notice of said suit or proceeding before said mayor, and upon the rendition of judgment thereon paid off the same, amounting to the sum aforesaid, without any appeal or application for an appeal from said judgment, they must find for the defendant."

The court refused the following instructions asked by plaintiff: "1. The jury are instructed that the ordinance of the city read in evidence and under which the fine was imposed on plaintiff was and is null and void, and conferred no authority on the mayor to impose said fine; and if the jury believe from the evidence that the plaintiff was arrested by the constable of the city and compelled to pay said fine, then they will find for the plaintiff the amount so paid by him, and may allow interest thereon at the rate of six per cent. per annum from the time it was so paid. 2. The jury are instructed that if there was a judgment against the plaintiff rendered by the mayor of the city under the ordinance in question, and the amount of said judgment was collected by an officer of the city under the direction of the mayor, then the payment thereof by the plaintiff was not voluntary, and he is entitled to recover it back. 3. The ordinance of the city under which the fine was imposed was and is void, and conferred no authority upon the city or its officers to impose or collect said fine, and the plaintiff is entitled to recover the amount he paid to the city back again, and the jury will find their verdict for plaintiff for the amount so paid by him."

The plaintiff took a nonsuit, with leave, &c.

Douglass & Hayden, for plaintiff in error.

I. The jurisdiction of the mayor of the city of Boonville is limited. It is not the policy of the law to confer unlimited

Willis v. City of Boonville.

jurisdiction upon inferior courts and magistrates. By the general law the jurisdiction of justices of the peace is limited. The legislature seems to have conferred upon the mayor only the jurisdiction of a justice of the peace. (Sess. Acts, 1839, p. 299, § 28.) By the act of February 15, 1841, (Sess. Acts, 1841, p. 306,) he is expressly made a justice of the peace. A justice of the peace can not try an action for any penalty exceeding ninety dollars given by any statute of this state. (R. C. 1855, p. 925, § 2.) The penalty imposed by the ordinance in this case is one hundred dollars. The corporate authorities had no power to enlarge the jurisdiction of the mayor beyond that of a justice of the peace. The ordinance is therefore void. (City of Fayette v. Shafroth, 25 Mo. 445; Harrison v. State, 10 Mo. 686; 9 Mo. 692.)

II. The imposition of the fine being illegal and the payment compulsory, it may be recovered back. (Elliott v. Swartwout, 10 Pet. 137; 4 Pick. 361; Preston v. City of Boston, 12 Pick. 7; Hearsy v. Buyn, 7 Johns. 179; Ripley v. Gelston, 9 Johns. 201; Irving v. Wilson, 4 D. & E. 480; Quinette v. Washington, 10 Mo. 55; Broom's Leg. Max. 195; 2 Smith, Lea. Cas. 324; Pickering v. Coleman, 12 N. H. 148.)

Vest, for defendant in error.

I. The mayor did not exceed his jurisdiction in imposing a fine of one hundred dollars. (Sess. Acts, 1839, p. 297, § 11; Sess. Acts, 1847, p. 183, § 3; Sess. Acts, 1841, p. 306.) The case of the City of Fayette v. Shafroth, 25 Mo. 447, is inapplicable to this. The charters are widely different. The ordinance is legal. The payment was voluntary and the plaintiff can not recover it back. The plaintiff did not appeal. No execution was issued. No defence was made. (Walker v. City of St. Louis, 15 Mo. 573; 20 Mo. 143; 10 Pet. 153; Chitty on Contracts, 190; 2 Smith, Leading Cas. 323; 25 Mo. 597; 1 Peters, 15.)

RICHARDSON, Judge, delivered the opinion of the court.

The eleventh section of the charter of the city of Boonville (Sess. Acts, 1839, p. 297) confers upon the mayor and board of councilmen the power to provide by ordinance "for licensing, taxing and regulating auctions;" and there can be no doubt about their authority to prohibit persons from exercising the business of auctioneers without license by such fines or penalties as they may think proper to impose. There is no limitation on the power; and no reason is perceived why the fine or penalty prescribed by the ordinance may not exceed ninety dollars.

The ordinance under which the plaintiff was fined fixed the penalty at not less than one hundred dollars, and the only question in the record is whether the mayor had jurisdiction of the case. This question seems to be conclusively answered by the third section of the act to amend the charter of Boonville, approved February 13, 1847, (Sess. Acts, 1847, p. 183,) which declares that "the mayor shall have exclusive original jurisdiction over all cases arising under the act of incorporation and upon all ordinances of the city." And if a prosecution had been commenced against the plaintiff in the circuit court for violating the ordinance regulating auctions, it could have been dismissed on the ground that the mayor had exclusive jurisdiction of the case.

Independent of the amendment of 1847, the jurisdiction of the mayor would be sustained. The twenty-eighth section of the original charter provides that "the mayor, and each justice of the peace within the city, shall have jurisdiction of all cases arising under the act of incorporation and under the ordinances of the city, subject to an appeal, in all cases above the sum of five dollars, to the circuit court." By this section the jurisdiction is coördinate, which is afterwards made exclusive; and though justices of the peace, by the general law, had not then nor since jurisdiction in actions to recover penalties, exceeding ninety dollars, given by any statute of the state, the legislature had the power to confer

Billingsley's Adm'r v. Bunce.

a greater jurisdiction on justices of the peace in Boonville. The act of February, 1841 (Sess. Acts, 1841, p. 306,) instead of limiting, clearly enlarges the jurisdiction of the mayor. Before that time he could only take cognizance of cases arising under the charter and ordinances of the city, but by the act of 1841 he was clothed with the same jurisdiction as justices of the peace in all civil cases. The case of the city of Fayette v. Shafroth, 25 Mo. 445, is unlike this one. There the charter of Fayette only gave the mayor the same jurisdiction, in all cases, in the city, as justices of the peace have in their respective townships. But, in Boonville, the mayor has not only concurrent jurisdiction with justices of the peace in all civil cases, but exclusive original jurisdiction, without regard to the amount, "over all cases arising under the act of incorporation and upon all ordinances of the city."

The other judges concurring, the judgment will be affirmed.

BILLINGSLEY'S ADMINISTRATOR, Defendant in Error, v. BUNCE,
Plaintiff in Error.

1. Whenever it appears from the face of an assignment of a stock of goods to a trustee for the benefit of certain designated creditors, that it is the intention of the parties thereto that the grantor shall be allowed to remain in possession of the property assigned, and to dispose of the same in the usual course of business until default, such deed of assignment is a conveyance in trust to the use of the grantor within the first section of the act concerning fraudulent conveyances, and consequently void as against creditors; it is sufficient to avoid the assignment that such appears, from a consideration of the whole instrument, to be the intent of the parties. (Stanley v. Bunce, 27 Mo. 289.)

Error to Cooper Circuit Court.

This was an action commenced October 17, 1857, against W. W. Norris and others on a promissory note for \$5,643.36. A writ of attachment was issued October 17, 1857, against

Billingsley's Adm'r v. Bunce.

Norris, and Harvey Bunce was summoned as garnishee of said Norris. Upon the trial of the issue raised in this garnishment proceedings, three several deeds of trust, executed by said Norris, to said Bunce as trustee for various creditors of said Norris were adduced in evidence. These deeds are known as those marked (A), (B) and (C) respectively. The deed marked (A) is dated October 10, 1857, and by it said Norris conveyed to said Bunce property described as follows: "All the stock of goods, wares and merchandise of every description now in the storehouse of said party of the first part, in the city of Boonville, county of Cooper and state of Missouri, being the same heretofore belonging to the firm of Norris & Keizer, but which now belongs to the party of the first part; and also all goods, wares and merchandise which the said Norris may at any time within twelve months purchase for the purpose of renewing or replenishing said stock; also all bonds, bills, notes, accounts, books of account and choses in action which belonged to the late firm of Norris & Keizer, and which now belong to the said Wm. W. Norris (the said firm having been dissolved and the said Norris upon their dissolution having become the owner of the same); and also all notes, bonds, bills, debts, accounts and account books belonging to said party of the first part, and all such as may be created at any time within one year from the date of these presents; also the following slaves [naming them]; also the following land [describing it]: To have and to hold the said property, &c., to him, the party of the second part, and to his heirs and assigns forever. But this deed is upon the following express condition—that is to say, whereas the parties of the third part are sureties for the said William W. Norris, and also for the late firm of Norris & Keizer, to sundry persons, for various sums of money, and have agreed to become the sureties for said W. W. Norris from time to time for various amounts, for the next ensuing one year, not to exceed ten thousand dollars; now if the said William W. Norris does well and truly save the said parties of the third part, and each of them, harmless from any and all liabilities

they are now under for him as aforesaid, and for the said Norris & Keizer as aforesaid, and from all they may incur as aforesaid for him, then this deed to be void; otherwise to remain in full force and virtue." The deed then proceeds to provide that in case of default the trustee shall, at the request of the *cestuis que trust* or either of them, proceed to sell the property and collect the debts, &c., and apply the proceeds to the payment of all liabilities that said *cestuis que trust*, or either of them, might be under as sureties.

The second deed, marked (B), was dated October 12, 1857, and the property conveyed is described precisely as in the above deed. It was made to secure certain indebtedness to various parties. These deeds are those passed upon by the supreme court in the case of Stanley v. Bunce, 27 Mo. 269.

The deed marked (C) was dated October 13, 1857. The property conveyed to Bunce by this deed was described therein as follows: "All the property and effects, real, personal and mixed, lands, goods, merchandise, &c., described in three certain deeds of trust now upon record in the clerk's office of Cooper county, state of Missouri, which said deeds were executed by said W. W. Norris, the first to protect the payment of certain debts due by Norris to B. S. Wilson & Co., and the other two to Harvey Bunce as trustee for the benefit of Weeden Spinney, Henry Corum, John Taylor, George Cockrill and others,—for a more particular description of which said property hereby conveyed reference is made to the said deeds and the contents of the same as shown upon the record above referred to." This deed was made to secure the payment of debts due from said Norris to various parties named therein. It was further stipulated, that in case of default the trustee should proceed to sell and apply the proceeds to the payment of the debts recited.

At the instance of the plaintiff the court declared the law as follows: "The deeds in evidence are void, as a matter of law, upon their face." The court refused the following instruction or declaration of law asked by the defendant,

Billingsley's Adm'r v. Bunce.

Bunce: "The instrument of writing produced in evidence and marked (C) is a good and legal conveyance by W. W. Norris to Harvey Bunce as trustee of the property described in the instruments marked respectively (A) and (B), and the said writing marked (C) conveys to the garnishee all the right, title and interest of said Norris in and to the goods, wares and merchandise, bonds, bills, notes, choses in action, slaves, real estate, &c., described in the writings marked (A) and (B), the said property to be held by said Bunce in trust for the benefit of the creditors of said Norris named in said writing (C), and to secure the debts therein set forth."

The court rendered judgment against the garnishee.

Stephens & Vest, for plaintiff in error.

I. The deed referred to as exhibit (C) does not come within the opinion of this court in the case of *Stanley v. Bunce*, 27 Mo. 270. There is a vast difference between this deed and those passed upon in that case. The deed now in question is a plain ordinary deed of trust to protect *bona fide* creditors, without a single unusual provision in any part of it. It is true it refers, for a description of the property conveyed, to the prior deeds made by Norris, which have been adjudged void by this court. It does not embrace by this reference that clause which states that the beneficiaries had agreed to become sureties for Norris from time to time. The words "for the purpose of renewing or replenishing his said stock" are not a necessary part of the description and are not therefore adopted. Leaving out this clause, it is not "a natural or irresistible inference from the face of the deed that Norris was to remain in possession and dispose of the goods in his ordinary course of business." Norris had the right to convey the goods he might purchase in future. That part of the first deeds only is adopted which describes the property conveyed, not the surplusage. (2 Pars. on Contr. 62; *Page & Bacon v. Gardner*, 20 Mo. 508.)

Douglass & Hayden, for defendant in error.

I. The deed to Bunce was void on its face. (See *Stanley*

West v. Best.

v. Bunce, 27 Mo. 269; 24 Mo. 575, 63; 20 Mo. 503; 15 Mo. 459; 1 Sm. L. Cas. 59; 4 Comst. 580; Burrill on Assign. 70; 7 Paige, 568; 4 Barb. 546; 10 Watts, 237; 3 Mo. 297; Zeigler v. Maddox, 26 Mo. 575.)

NAPTON, Judge, delivered the opinion of the court.

In this case the deed of trust, declared void by the court of common pleas, conveyed the property by terms of description identical with those employed in the two deeds passed upon by this court in Stanley v. Bunce, 27 Mo. 269. The language of these two deeds descriptive of the property conveyed may be considered as incorporated in the deed now under consideration. The description of the property is so made as to indicate an intention of conveying, not property generally acquired in the future, but property to be acquired for a particular purpose, which purpose clearly implies a continuance of Norris' previous business as a merchant. This business was not to be interrupted except at the instance of the trustee, and for the benefit of the *cestuis que trust*, and upon the happening of certain contingencies specified in the deeds. It is true, there were, in the two deeds referred to, some additional clauses calculated to strengthen the construction given to them by the court, but the present deed is substantially and essentially subject to the same objections.

Judge Scott concurring, judgment affirmed.



WEST, Respondent, v. BEST, Appellant.

1. Where the obligation to pay a promissory note is made dependent upon the performance by the payee thereof of a condition contained in a collateral agreement entered into between the payee and the maker, and the maker of the note waives the performance of the condition, his obligation becomes fixed and complete.
2. Where A. conveys land to B. and B. gives his notes for the purchase money, and, there being doubts as to A.'s title, both parties enter into an agreement that unless A. within a reasonable time make good title to the

West v. Best.

land, the notes should become void and B. should restore the land to A., and A. sues B. on the promissory notes; *held*, that the question whether A. had made good the title to the land within the meaning of the agreement is a question of law for the court.

3. A justice of the peace can not take the acknowledgment of a married woman of a deed conveying her real estate; the acknowledgment must be taken by some court having a seal, or some judge, justice or clerk thereof.

Appeal from Randolph Circuit Court.

This was an action on two promissory notes, for one thousand dollars each, executed by defendant in favor of plaintiff. The defence is that said notes were given in consideration of the sale by plaintiff to defendant of a certain tract of land the title to which had failed. It appeared in evidence that West, the plaintiff, in 1857, sold to Best a certain tract of land for two thousand five hundred dollars, and executed a deed therefor with covenants of warranty. There being some doubt as to the title, the parties entered into a written agreement, whereby, after reciting that there appeared to be some doubt as to the title to the land, it was stipulated that if West should fail in a reasonable time to make good the title, the notes should become void, and he (West) should refund to Best the portion (five hundred dollars) of the purchase money that had been paid, and the land should be restored to West. It also appeared in evidence that in 1819 one Eliza Flesher had conveyed said tract to W. H. Ashley, but plaintiff failed to show documentary title from said Ashley. Plaintiff showed that he had been in possession for more than twenty years. The defendant read in evidence a deed executed by plaintiff in 1834 conveying the land in controversy to his son J. P. West. To rebut this evidence, plaintiff read in evidence various conveyances to himself from the heirs, the brothers and sisters of said J. P. West. Among them was a deed purporting to be executed by a guardian of one of these minor heirs; also a deed from one of said heirs and her husband. The latter deed was acknowledged before a justice of the peace, and its admission in evidence was objected to on that ground. There was also evidence tending to show that

West v. Best.

West, the plaintiff, went to defendant and offered to return to him the money received on the land and receive back the land according to the agreement; that Best refused to do this, and waived compliance with said contract by West and agreed to pay for the land. At this interview West showed to the defendant a written statement or opinion concerning his title, given to him by Judge Hall, who had formerly been his counsel in litigation concerning this tract of land. This statement of Judge Hall was read in evidence against the objection of defendant. In this statement entire confidence was expressed in the title of West.

The following instructions, given at the instance of the plaintiff, are those referred to in the opinion of the court: "3. If the jury believe from the evidence, that the notes sued on were given for the land mentioned in the agreement given in evidence, and that plaintiff had, at the time of the execution thereof, or has since, acquired good title to said land, they will find for plaintiff the amount of said notes and the interest thereon. 4. Although plaintiff had conveyed to his son Perry the land and did not have his wife's relinquishment of their title to him at the time he conveyed to Best, yet if he has since acquired title as shown by the deeds offered in evidence, the title thus acquired enures to defendant, and plaintiff is entitled to recover so far as that objection goes."

Other instructions were given and refused on both sides.

Shackelford and Turner, for appellant.

I. Title acquired by twenty years' possession is not such as was contemplated by the agreement. Evidence of adverse possession was therefore irrelevant and ought to have been excluded. There was not even color of title in plaintiff previous to his conveyance to his son. The third, fourth and fifth instructions given for plaintiff were erroneous. The statement of Judge Hall was improperly admitted in evidence. The court also erred in giving the first instruction for plaintiff, also in giving the instruction of its own motion, also in refusing those asked by defendant. The court erred

in giving those instructions asked concerning the waiver. The guardian's deed ought to have been excluded. The county court did not have jurisdiction of the sale of a minor's land except for purposes not appearing to have been the object of this sale. Justices of the peace are not authorized to take acknowledgment of deeds conveying the lands of married women. The deeds from the married sisters of J. P. West should have been excluded.

Burckhardt and Davis, for respondent.

I. The defendant Best waived the necessity of a compliance with the contract and agreed to pay for the land regardless of any defect in the title. It was upon this point that the case turned in the court below. This waiver he could make by parol. (3 Metc. 486.) A justice of the peace is authorized under the revised code of 1855 to take acknowledgment of the deed of a married woman conveying her real estate. The instructions given placed the law of the case fairly before the jury.

Scott, Judge, delivered the opinion of the court.

This is an action founded on two promissory notes. The payment of the notes was made dependent on the compliance with a condition contained in a collateral agreement. It is obvious that if the performance of the condition was waived by the party in whose behalf it was to have been done, he could not afterwards resist their payment. If the plaintiff had placed his right to a recovery on the ground of a waiver of the performance of the condition, and there had been a verdict in his favor, the judgment would not have been disturbed. But there were instructions given for him which renders a reversal of the judgment necessary.

The third instruction given for the plaintiff was, we conceive, erroneous. It put the question of law to the jury. Whether the plaintiff had a good title to the tract of land, the price of which formed the consideration of the notes sued on, was a matter of law to be determined by the court.

The instruction was moreover wrong in this, that it put as a hypothesis to the jury a matter about which there was no dispute; as it is clear that, if the case was made to turn on the validity of the plaintiff's title as presented by the record, he must have inevitably failed.

The fourth instruction given for the plaintiff is also exceptionable. A married woman can not convey her real estate by acknowledging her deed before a justice of the peace. The thirty-fifth section of the act concerning conveyances prescribes that a married woman may convey her real estate by acknowledging the conveyance and having it certified by some court having a seal, or some judge, justice or clerk thereof. (R. C. 1855, p. —.) These words, in our opinion, determine the court or officer who is to certify a deed conveying a married woman's land. A justice of the peace has never had, under our statute laws, authority to take the acknowledgment of a conveyance passing the title of a married woman to her land. We are not of the opinion that the general words "or other officer," contained in the thirty-seventh section of the same act, were designed to change the general provision which fixed the tribunal or officer by whom the deeds of married women conveying their lands were to be certified. The thirty-fifth section determined those who were to perform such acts, and we will not presume that, by any general terms, that was unfixed which had been made firm and stable.

We do not see the propriety in giving the fifth instruction for the plaintiff. His having a color of title did not affect the merits of the controversy. If the defects of his title were not waived by the defendant, then the defendant was entitled to a good title. The instruction was of a tendency to mislead the jury.

We do not see the point of the objection to the deed of D. W. Davit, guardian, to the plaintiff. We see no impropriety in refusing the defendant's second, fourth, fifth, sixth and seventh instructions.

The certificate of Judge Hall, as to the state of the title

Climer v. Wallace.

of the plaintiff, was properly admitted as evidence, it being qualified with the direction that it was no evidence of title in him. It served to strengthen the evidence of the witness, who testified to the fact of a waiver of all objections to the title and furnished a motive to the defendant in making it.

Reversed and remanded. Judge Napton concurs. Judge Richardson concurs in reversing.

CLIMER *et al.*, Respondents, v. WALLACE, Appellant.

1. A worm fence is a part of the freehold and passes along with the land upon which it is built.
2. Where two adjoining proprietors agree to put up a partition fence between them, each to own that portion of the fence put up by himself, and the fence built by one is mistakenly located upon the land of the other, and the latter sells his tract to a person who has no notice of the agreement as to the ownership of the fence, such purchaser will take the fence so located upon his land.
3. The corners established by the United States surveyors in surveying the public lands are conclusive as to the actual location of the boundary lines of sections and such subdivisions thereof as are authorized by the laws of the United States; it can not be shown that the United States surveyors mistakenly located such corners.

Appeal from Maries Circuit Court.

The facts in evidence sufficiently appear in the opinion of the court. The court gave the following instructions at the instance of the plaintiffs: "1. In ascertaining the boundaries of United States lands according to the government surveys, the boundary lines actually run and marked by the public surveyors are to be taken as the true boundaries, although such marked boundaries may not correspond with the courses and distances. Courses and distances must yield to an ascertained corner or boundary, and although such corners or boundaries may have been effaced or destroyed, yet if the locality can be ascertained by ——— testimony, it will prevail. 2. Boundaries may be proved by a witness

Climer v. Wallace.

who is acquainted with the lines and corners run and established by the surveyor, although he never saw the land surveyed; but if the jury find that witnesses were not familiar with lines and corners of government surveys, their evidence will be disregarded. 9. If the jury believe from the evidence that at the time of the purchase by plaintiffs, or either of them, of the south-east quarter of the north-east quarter of section thirty, township forty, of range seven west, he had no notice of the partition fence between said land and that of defendant, and was not apprised of the circumstances under which said fence was put up, and further believe that defendant wrongfully and without leave removed from the land of the plaintiff the rails claimed in his statement of facts, or any less number, they will find for plaintiffs the value of said rails so removed by defendant."

The court gave the following instructions asked by defendant: "1. Unless the jury believe from the evidence that the defendant took the rails sued for off the land of the plaintiffs, the jury will find for the defendant. 2. Although the jury may believe the defendant took the rails sued for off of the plaintiffs' land, yet if they further believe from the evidence that, before plaintiffs purchased said land and while it belonged to Pinnell, he and defendant made the fence in controversy, with the understanding that so much of the fence made by each should be the property of each one as made by himself; and further, that, before the payment of the purchase money and the reception of the deed by the plaintiffs from Pinnell, he informed plaintiffs or either of them of defendant's right to said rails, the jury will find for the defendant."

The court, of its own motion, gave the following instruction: "The lands of the plaintiffs and defendant being divided by descriptions as given in the deed of the plaintiffs from Pinnell, the boundary line actually run and marked by the public surveyor is to be taken and considered as the true boundary or dividing line between the parties, and the witnesses in this cause were permitted to speak of their surveys

Clymer v. Wallace.

and examinations only for the purpose of explaining the means resorted to for the purpose of discovering the United States survey."

The jury found for plaintiffs.

Parsons and Pomeroy, for appellant.

I. The court erred in giving the ninth instruction. It was not necessary that plaintiffs should have notice of the arrangement between Pinnell and defendant in regard to the partition fence. The court should have given the defendant's third instruction. The land was surveyed by the officer authorized by the law. Defendant had the right to adopt the lines thus established. (4 Pick. 242; 4 Barr, 236.) The court erred in giving the instructions of its own motion.

Ewing and Batte, for respondents.

1. There was no error in the ninth instruction. The third instruction asked by defendant was properly refused. (4 Pick. 239.) Neither ignorance nor mistake will excuse a trespass. The instruction given by the court at its own instance contained no error.

SCOTT, Judge, delivered the opinion of the court.

One Pinnell and the defendant, Wallace, were owners of a tract of land adjoining each other. It seems that the two tracts were legal subdivisions of sections as required to be subdivided by the laws of the United States. They agreed to run a partition fence between them, each one to have the portion of the fence he should make. Before the fence was put up, the line was run by the county surveyor between the owners, and it was supposed that each owner had put his portion of the fence on his own land. Afterwards, Pinnell conveyed his tract to the plaintiffs, G. & J. Clymer. The defendant, having cause to apprehend that his fence was over the line and on the land which the plaintiffs had purchased from Pinnell, removed the fence he had put

Climer v. Wallace.

up a few feet, and placed it on his own land. There was some evidence that the plaintiffs, at the time of their purchase from Pinnell, were aware of the existence of the agreement between him and the defendant Wallace in relation to the dividing fence, and that one of them said that the defendant Wallace was entitled to the rails, as he had made and put them up, and should have them if he would let them remain where they were. This is an action for taking away or removing the rails by the defendant. There were many instructions in the case, all of which will not be noticed. There was a verdict for the plaintiffs and a new trial granted, and on a second trial there was again a verdict for the plaintiffs.

This seems to be a hard action, judging from what appears on the record, but the law must have its way. Our courts hold that a worm fence is a part of the freehold and passes along with the land on which it is built. The agreement between Pinnell and the defendant Wallace in relation to the fence did not affect the plaintiffs. They would look to the title papers of Pinnell in order to ascertain what they were buying, and, if they showed that they were entitled to the fence by reason of its being part of the estate which they purchased, they could not be affected by any agreement to which they were not parties, and of which they had no notice. Wallace, the defendant, should have seen that his agreement with Pinnell was put upon the record in such a way as to be noticed. The jury found that the plaintiffs had no notice of the agreement, for, by an instruction given by the court, the case was made to turn on the fact whether the plaintiffs had notice of the agreement between Pinnell and the defendant.

The corners established by the original surveyors under the authority of the United States could not be altered, whether properly placed or not, and no error in placing them could be corrected by any survey made by individuals or by any surveyor deriving his authority from the laws of the state. This, it is conceived, is the idea conveyed by the

Long v. Gilliam.

instruction given by the court at its own instance, which, though not very happily expressed, could not have misled the jury, as it does not appear that the fact the fence was on the land of the plaintiffs was contested on the trial. The other surveys were offered, at least those on the part of the defendant, to show the innocency of his intention in placing the fence where he did.

Affirmed ; the other judges concur.

—♦♦♦—

LONG, Respondent, v. GILLIAM *et al.*, Appellants.

1. A. conveyed to B. a slave in trust to secure and indemnify the latter against loss by reason of his being security for A. B. acting under a power in the deed of trust sold said slave to C., taking a bond to himself "as trustee of A." for a portion of the purchase money. The slave was afterwards taken from the possession of C. by the true owner from whom A. had stolen him. *Held*, that there was a failure of consideration of the bond, and payment thereof could not be enforced against C.

Appeal from Chariton Circuit Court.

This was an action on a bond executed by the defendants, whereby they promised to pay plaintiff, "Richard Long, trustee for Benjamin E. Horne," the sum of two hundred and six dollars. The error complained of is the striking out, on motion of plaintiff, of the answer of the defendants. In this answer the defendants allege, substantially, that the plaintiff, assuming to act as trustee for one Benj. E. Horne, sold a certain slave to Isham R. Gilliam, one of the defendants, for eight hundred and twenty-six dollars; that said Isham R. Gilliam at the time of sale paid to plaintiff six hundred and twenty dollars, and executed the bond in suit, with the other defendants as securities, for the balance of the purchase money; that said Horne in his said deed of trust conveyed said negro with other property to the plaintiff to secure and indemnify him against loss by reason of plaintiff's being his (Horne's) security, the said Horne covenanting

Long v. Gilliam.

and representing that he was the owner for life of said slave ; that plaintiff, as the agent and trustee of said Horne, sold said slave to said defendant on a credit, and conveyed the said slave to him by bill of sale, as the deed authorized him to do ; that the only consideration for said bond was the balance due on said sale ; that at the time of the execution of said deed and at the time of said sale neither the said Horne nor the plaintiff had any title to the slave, but that the said slave was and is the property of one Bibb of the state of Mississippi, from whom said Horne had stolen him ; that said Bibb, by virtue of his said ownership, has taken said slave from the possession of said defendant, who has entirely lost said slave ; that the consideration of said bond has entirely failed.

Prewitt & Davis, for appellant.

I. The title to the slave having failed, there is no consideration for the promise, and the plaintiff is not entitled to recover. The title is presumed to be warranted. The trustee acted as the agent of Horne. In his bill of sale he refers expressly to Horne's deed to himself. (9 Mo. 840 ; 21 Mo. 338 ; Story on Sales, 423 ; Burrill on Assign. 462 ; 3 Sumn. 8 ; 21 Mo. 72.)

Turner, for respondent.

I. There is no pretence that Long was guilty of any fraud in the sale of the slave, or had any knowledge of the defect in the title. He only undertook to sell such title as was conveyed to him by the deed of trust, without warranting it. The purchaser can not avoid paying the purchase money on the ground of a failure of title. He risked the title without warranty. In official and fiduciary sales there is no implied warranty of title. (9 Wheat. 616 ; 8 Porter, 134 ; 1 Pars. on Contr. 456 ; 10 Mo. 157 ; 14 Mo. 153 ; 25 Mo. 572 ; 4 J. J. Marsh. 299.) The sale in this case was analogous to execution or administration sales. The maxim *caveat emptor* applies. Long was not acting as Horne's agent, but as a trustee for the benefit of creditors. Even if there had

State v. Mitchell.

been a warranty, the defence would not be good without a lawful eviction. (*Morrison v. Edgar*, 16 Mo. 411.) The voluntary surrender of the property is not sufficient.

SCOTT, Judge, delivered the opinion of the court.

There is no attempt in this case to make the trustee personally liable on any warranty express or implied, and in this respect it is distinguishable from those cited by the plaintiff's counsel. If Horne, the grantor in the trust deed, had sold the slave without the intervention of a trustee, it would hardly be maintained that he could recover his value from the purchaser. If one steals property, he must know that he has no title, and a sale by the thief is a fraud on the purchaser, which will avoid the transaction. We do not consider the case is bettered by the interposition of a trustee, who is a mere volunteer, an agent of the grantor in the trust deed. That the trust was for the benefit of the trustee can make no difference. If a vendor can not make a title himself, it would be singular that the law should enable him to do it by the intervention of a trustee or agent. If the law is otherwise, fraudulent men have discovered a way which would be an easy one of paying their debts.

The other judges concurring, the judgment is reversed and the cause remanded.



THE STATE, Respondent, v. MITCHELL, Appellant.

1. A druggist who, in good faith, sells intoxicating liquor, whisky, for medical purposes, can not be rendered liable to an indictment for selling liquor in a less quantity than a gallon; he is not required to institute a strict inquisition into the motives and objects of the persons dealing with him.

Appeal from Greene Circuit Court.

The following is the instruction given by the court: "If the jury believe from the evidence in this case that the de-

State v. Mitchell.

defendant, in the county of Greene, within one year before the finding of this indictment, did sell any whisky in a quantity less than one gallon, they must find the defendant guilty, unless the jury further find from the evidence that the defendant was a dealer in drugs and medicines and that the whisky was used only for medicinal purposes."

Waddell, for appellant.

Ewing, (attorney general,) for the State.

NAPTON, Judge, delivered the opinion of the court.

The defendant was indicted for selling whisky in quantities under a gallon. It appeared on the trial that he was a dealer in drugs and medicines, and was also family physician to the person who purchased the whisky, and that he had prescribed the whisky to be used in combination with certain barks as a tonic mixture for the purchaser's wife. The purchaser, however, used a portion of the whisky as a mere beverage for himself and gave a dram or two of it to some of his visitors. This was in the absence of the defendant and without his knowledge, so far as it appeared and occurred at the purchaser's house after the whisky was brought from the store of defendant. The defendant, under the instructions of the court, was convicted.

In our opinion, the conviction was wrong. It is not, we apprehend, the intention of the act authorizing druggists to sell spirituous liquors to require them to institute a strict inquisition into the motives and objects of persons dealing with them, either in the purchase of medicines or liquors which are treated as such; much less are they required to prosecute any domiciliary inquisitions in order to be assured that no fraud has been practiced on them or on the law. Such an inquisition would be as odious as it would be impracticable and useless. The law has not pointed out any mode by which dealers in drugs and medicines, who are expressly authorized to sell spirituous liquors for medical uses, are to ascertain whether the liquors are *bona fide* intended

and applied for the purposes assumed by the purchasers. It may be that there would be inherent difficulties in framing such a law. At all events the law contains no such provisions. The legislature, for reasons of public policy satisfactory to them, have thought proper to confine the dealing in liquors in small quantities to a certain class of merchants whose main business is the sale of medicines. Such dealers are allowed to sell brandy and whisky and other liquors of this description for the same purposes they are authorized to sell calomel and opium and other drugs. They have no more means of ascertaining, nor has the statute provided them with any, whether the brandy or other liquor is used for such purposes, than they have to ascertain whether the opium or calomel is. The legislature did not make them responsible for any evasion of the law by persons purchasing from them. Such a responsibility, indeed, it is plain, would render the privilege nugatory and impracticable. It may have been thought that much might be entrusted to the intelligence and good character of the class of dealers to whom this privilege was conferred, and although liable to abuse, that much good would still be effected. However this may be, the defendant was not only a druggist, and therefore authorized to sell the whisky, but as a physician he had prescribed it to be used in the family of the purchaser. Surely the legislature never intended to subject him to a criminal indictment and heavy fine because the purchaser used a portion of it himself, or permitted his neighbors or servants or any portion of his family to use it for purposes other than those for which it was sold.

Judgment reversed and case remanded. The other judges concur.

THE STATE, Respondent, v. WELLS, Appellant.

1. A dealer in drugs and medicines is a merchant within the meaning of the first section of the act to tax and license merchants. (R. C. 1855, p. 1072.)
2. To constitute a merchant a dealer in drugs and medicines within the meaning of the twenty-second section of the act to tax and license merchants (R. C. 1855, p. 1077) so as to authorize him, under his license as a merchant, to sell spirituous liquors in any quantity when it is used only for medical purposes, it is necessary that he should be engaged principally in selling drugs and medicines, though he may incidentally admit into his store and may vend articles not strictly falling under the denomination of drugs and medicines.

Appeal from Linn Circuit Court.

The facts sufficiently appear in the opinion of the court.

Prewitt, for appellant.

I. The court erred in refusing to hear defendant's testimony. Section twenty-two of the act to tax and license merchants (R. C. 1855, p. 1077, § 22) allows a dealer in drugs and medicines to sell liquor in any quantity when it is used only for medical purposes. The circuit court seems to have entertained the idea that defendant had first to show that the liquor was prescribed by a practicing physician. The case of *The State v. Larimore*, 19 Mo. 391, was decided before the passage of this act. This act says nothing about a physician.

Ewing, (attorney general,) for the State.

I. The evidence offered by defendant as to his having a merchant's license authorizing him to sell drugs and medicines was properly excluded. It is true that the term merchant includes dealers in drugs and medicines, but it is only that class of druggists who do not combine with their appropriate business as such that of dealing in general merchandise, who may sell liquor when it is used only for medical purposes. There was no evidence that the liquor was used for medical purposes. (*State v. Larimore*, 19 Mo. 392; 20 Mo. 420.)

NAPTON, Judge, delivered the opinion of the court.

The defendant was indicted for selling intoxicating liquors in quantities less than one gallon, and the proof on the part of the State was that he did so sell. The defence offered was a merchant's license, and proof that under this license the defendant was a dealer in drugs and medicines, and that the liquor which he sold was for medical purposes. The twenty-second section of the act to tax and license merchants prohibits a merchant from selling vinous, fermented or spirituous liquors in less quantities than one gallon, but allows a "dealer in drugs and medicines" to sell such liquors in any quantity when it is used only for medical purposes. A "dealer in drugs and medicines" is a merchant within the meaning of the first section of this law, and he deals in these articles under his general license as a merchant. The merchant is prohibited from selling intoxicating liquors in quantities under a gallon; but the dealer in drugs and medicines, although he is also a merchant, and in fact may be engaged in selling a great variety of articles of merchandise besides drugs and medicines, is however allowed to sell these intoxicating liquors, provided they are *used only* for medical purposes. The law is obscure, and no mode is specified by which the dealer is to be satisfied of the purpose to which the liquor sold is to be applied. But as it is manifest that the intention of the act is to make a distinction between merchants and dealers in drugs and medicines in reference to the power of retailing spirituous and vinous liquors, and as a merchant is not necessarily a dealer in drugs and medicines, although the latter is necessarily (under the definition of the act) a merchant, we suppose the proper mark of distinction to be found in the main and principal and leading business of the dealer. A person who, under a merchant's license, is principally engaged in selling drugs and medicines, although incidentally admitting into his store articles not strictly falling under the denomination of drugs or medicines, would be, we suppose, within the protection of this section, and privi-

Hardesty v. Newby.

ledged to sell liquors in any quantities for medical purposes. A merchant, however, whose principal dealings was in dry goods, groceries, provisions, &c., although, as is very commonly the case in country stores, keeping a small assortment of drugs for the convenience of his customers, would not, we apprehend, be allowed to sell spirituous liquors, except in the quantities permitted under the law, to merchants. As to what assurance may be required from the dealer or the purchaser to secure a *bona fide* application of the liquor which is permitted to be sold for medical purposes, it is not material to inquire in this case. The testimony offered ought to have been received. The judgment will therefore be reversed and the case remanded. The other judges concur.

HARDESTY, Respondent, v. NEWBY, Appellant.

1. Where a mature negotiable promissory note is delivered by the payee without endorsement to an agent for collection, the possession of the note by the latter will not raise a presumption that he has authority to assign the same; the burden of proving an assignment by authority of the payee rests upon the party claiming under such alleged assignment.

Appeal from Weston Court of Common Pleas.

This was an action on a negotiable promissory note for two hundred and twenty-eight dollars, dated March 10, 1858, and payable one day after date. The note was drawn payable to the order of A. W. Mason. The plaintiff in his petition alleged that said Mason, by his duly authorized agent, had assigned said note to plaintiff. The defendant admitted the execution of the note by himself, but denied the assignment, and alleged that Mason had notified him not to pay the note to plaintiff. It appeared that Mason had delivered the note, some time after maturity, to one Love for collection; that Love had no express authority to assign or transfer said note; that Love assigned said note to plaintiff

Hardesty v. Newby.

by writing on the back thereof as follows: "A. W. Mason, by W. R. Love." The court, at the instance of the plaintiff, gave the following declarations of law: "The law presumes that the plaintiff acquired the bill or note in the usual course of business for a valuable consideration, also that the endorsement was made by a person legally entitled to endorse and transfer the same. 2. If the plaintiff procured the note from an agent of Mason who had no authority to transfer the same, yet plaintiff is entitled to recover on the same unless the defendant proves that fact and that plaintiff had knowledge of the fraud; he is entitled to hold the same and recover on it as against the true owner. 3. If the court should believe that the party who sold the note was only an agent and had no right to transfer the note, yet his transfer is good as against the real owner unless the defendant proves that plaintiff had knowledge of the facts at the time he purchased the same." Declarations of law asked by defendant were refused by the court. The court found for plaintiff.

J. N. & C. F. Burnes, for appellant.

I. The declarations of Love were inadmissible to prove the fact of agency. An agent authorized to collect is not authorized to sell and endorse. The onus was on plaintiff to prove the assignment. (10 Mo. 33.) The note was assigned or attempted to be assigned by Love after maturity. The law does not presume that the plaintiff acquired it in due course of business. (2 Greenl. § 639; 3 B. & Cr. 45; Byles on Bills, 93.) The law does not presume that the endorsement was made by a person legally entitled to endorse and transfer. (7 Mo. 544; 9 Mo. 657; 9 Mo. 758.)

Doniphan & Lawson, for respondent.

I. The possession of the note by Love, the same being negotiable, was sufficient to authorize him to transfer the same to an innocent purchaser for value. (Bay v. Coddington, 5 Johns. Ch. 52.) Mason recognized and ratified the act of Love.

NAPTON, Judge, delivered the opinion of the court.

This was a suit upon a negotiable note, purchased by the plaintiff from one Love, who professed to be the agent of the payee, Mason, and who, in that capacity, endorsed it to plaintiff. It appeared that Mason handed the note to Love for collection, and Love had no express authority from him to sell or transfer it by assignment. The court held that the mere possession of the note by Love raised a presumption that he had authority to pass title, and that it was incumbent on the defendant, who was the maker of the note, to show that Love was not authorized to transfer the note and that this want of authority was known to the plaintiff.

This view of the subject is, in our judgment, erroneous. A negotiable note, after due and without any endorsement by the payee, occupies, so far as this question is concerned, no other position than a note not negotiable would. A party buying such paper from a stranger professing to be an agent of the payee, must establish the agency. Such agency may undoubtedly be either express or implied, but the mere circumstance of possession, when the note is not endorsed in blank, can raise no presumption either way. The natural and reasonable inference would be that the note was in the hands of such an agent merely for collection; for if a transfer had been designed by the owner of the note, he would of course put his name on the back of it.

The case of *Bay v. Coddington*, 5 John. C. R. 50, does not maintain any principle conflicting with this view. The notes, in that case, were endorsed in blank, and the court held that if they had been transferred in the usual course of trade and without any notice in the purchaser of the fraud of the agent or factor, a good title would have passed. But as the transaction was not regarded as a fair one, the transfer was not considered valid. This case and others of a similar character are cases of the transfer of negotiable paper, endorsed in blank by the payee, or payable to order. The title in such cases is held to pass where there is no fraud upon the part

Mooney v. Hannibal & St. Joseph Railroad Co.

of the purchaser, however destitute of authority may be the agent from whom the title is acquired.

In the present case, it devolved on the plaintiff, as he held the note by assignment, to prove the assignment; and as it purported to be executed by an agent, the further proof of agency was necessary. In many cases, very slight proof will establish this, owing to the previous dealings or relations of the parties. Here there was nothing to show an authority, either express or implied, but the bare circumstance of possession—a fact which could properly lead to no other conclusion than that the agent was an agent for collection and not for a sale of the note.

Judgment reversed and case remanded. The other judges concur.



MOONEY, Appellant, v. HANNIBAL & ST. JOSEPH RAILROAD
COMPANY, Respondent.

1. Justices of the peace have jurisdiction of actions brought against railroad corporations under the twelfth section of the general railroad act. (R. C. 1855, p. 414.)

Appeal from Macon Circuit Court.

Ryland & Son, Palmer and Burckhart, for appellant.

- I. The justice of the peace had jurisdiction of the action. (Sess. Acts, 1847, p. 157; id. p. 247; Sess. Acts, 1853, p. 321; Sess. Acts, 1855, p. 414; Sess. Acts, 1851, p. 232.)

Lamb & Lakenan, for respondent.

- I. The circuit court committed no error in dismissing the suit. The justice had no jurisdiction. The defendant was incorporated prior to the passage of the general railroad act of 1855. All railroad corporations existing prior to the passage of said act are exempt from the jurisdiction of justices of the peace except as in that act and in their own charters provided. (R. C. 1855, p. 414, § 38.) The exceptions here

Mooney v. Hannibal & St. Joseph Railroad Co.

meant evidently are the twenty-second section of the general railroad law and the second section of the act to amend the charter of defendant, approved February 23, 1853, each of which sections confers jurisdiction upon justices for certain purposes, but not to try ordinary suits against corporations. At the time of the grant of the charter to defendant justices of the peace had no jurisdiction of any action against any corporation. (R. C. 1845, tit. Justices' Courts, p. —, § 46.) The first section of the charter does not authorize suits against defendant in justices' courts; nor does it confer additional jurisdiction upon justices.

NAPTON, Judge, delivered the opinion of the court.

This was a suit brought before a justice of the peace by a laborer upon the Hannibal and St. Joseph Railroad against the company, under the twelfth section of the general railroad act. (R. C. 1855, p. 414.) The circuit court held that the justice had no jurisdiction, and this is the only question presented.

The general law, which formerly prohibited suits against corporations before justices of the peace, was repealed by the act of February 17, 1851. The jurisdiction in this case depends, therefore, entirely upon the construction given to the prohibition contained in the thirty-eighth section of the general railroad act. (R. C. 1855, p. 430.) That section exempts railroad corporations from the jurisdiction of justices' courts, except as in that act and in their respective charters may be otherwise provided. The general provision in the charter of the Hannibal and St. Joseph Railroad Company, which authorizes the corporation to sue and be sued in all courts of record and elsewhere, can not be construed any modification of the thirty-eighth section in the railroad law, for the plain reason, that if any force be given to the words "elsewhere," or "all courts whatsoever," the thirty-eighth section is totally destroyed and amounts to nothing. Nor is there any provision in the charter of this company or in the

Mooney v. Hannibal & St. Joseph Railroad Co.

act incorporating the Columbia and Louisiana Railroad, which is the basis of its charter, nor in any of the amendments passed at subsequent sessions of the legislature, which confers any special jurisdiction on justices of the peace in cases such as the present. This may be readily seen by reference to these acts, which are referred to in the briefs of the counsel and need not be particularly set forth here. We have seen, however, in the case of *Fatchell v. The St. Louis & Iron Mountain Railroad Co.*, 28 Mo. 178, that the fifty-first section of the general railroad law contains a special authority to sue these corporations for certain penalties not exceeding one hundred dollars in justices' courts, and there is also a proceeding to settle controversies between these corporations and individual proprietors concerning materials which may be needed in the construction of the road, which are commenced before justices of the peace under the twenty-second section of the act. The question in this case is, whether the twelfth section of the act, under which this proceeding was had, is another and third exception to the general provision of the thirty-eighth section.

It will be seen that this section does not specify what courts are to have jurisdiction over the proceeding provided for in it. The section does not say that the suits brought by the laborers shall be brought in the circuit court, nor that they shall be brought before justices of the peace. It is a mere matter of implication and inference as to what character of courts was within the contemplation of the act. In the absence, then, of any express declaration of the legislature as to the form designed for such proceedings, we must resort to the general policy of our legislation on this subject, and compare it with the remedies here provided. When this is done, we think the inference is very strong that the legislature designed these suits to be brought before justices' courts. The amount authorized to be sued for will not in any case exceed the jurisdiction of justices of the peace, and in a large majority of cases will hardly exceed half the sum fixed on as the limit of that jurisdiction. A speedy

settlement is also within the contemplation of the act. Only thirty days' wages of a common railroad laborer can be sued for, and only twenty days are allowed within which to notify the company or its agent, and the suit must be commenced within thirty days after notice. The whole controversy is expected to be settled in a few months and in the least expensive manner. The law evidently was looking to justices of the peace as the courts where the suits provided for were to be brought. Indeed, to compel such suits to be brought in the circuit court would, in many cases, where the sum of money involved was very trivial, amount to a virtual denial of any redress at all. If a day laborer on a railroad is compelled to go to the circuit court to recover a few days' wages, the necessary expenses of the litigation will exceed the amount of his recovery, and such a remedy as this is delusive. It only encourages or permits litigation which can do no good to either party litigant, unless it be considered as a gain to settle the abstract question of right or wrong in a dispute.

But when we look to the other side and inquire what benefit is to be gained by the corporation in requiring suits of this description to be brought in the circuit court, the inquiry appears to lead to the same result. Of what advantage can it be to such corporations to be put to the expense of a circuit court litigation in controversies of so trivial a nature?

It has been suggested that these suits might be scattered over a great extent of country, and in this way require the company's agent to hunt up obscure and remote points, and in this way, perhaps, suffer a great many suits to go against them by default. It is not perceived how there can be any more difficulty or expense for the superintendent on a particular section of a road to find out and attend to a suit in the immediate neighborhood of his road before a justice of the peace in the county, than there would be for him to go to the county town and attend the circuit court. It will be seen by reference to the details of the section, that a notice is required to be served upon the agent of the company who

Tucker v. Frederick.

is engaged in superintending the work for the payment of which the suit is authorized. We see no public policy, therefore, looking either to the interest of the railroad or of the laborer, which could favor a construction of the twelfth section of the railroad law so as to compel all the suits provided for in that section to be brought in the circuit court. There is nothing in the terms of the law to require such a construction, and the intent and spirit of it points altogether another way. We think the twelfth section, as well as the fifty-first and twenty-second, are to be understood as modifications of the general prohibition of the thirty-eighth section of the general railroad law.

Judgment reversed and case remanded. The other judges concur.

TUCKER, Appellant, v. FREDERICK, Respondent.

1. Where an attachment is based upon two grounds, and the plaintiff establishes one of them, it can not avail the defendant any thing to show that the other ground of attachment has no basis.
2. Declarations of the defendant in the attachment made after the attachment are inadmissible in his favor to explain away the effect of previous declarations.

Appeal from Kansas City Court of Common Pleas.

The facts sufficiently appear in the opinion of the court.

Ryland & Son and *Smith & Bouton*, for appellant.

I. The court improperly admitted the statements and declarations of defendant. The third instruction asked by plaintiff was improperly refused. The second and third instructions given for defendant should have been refused; they were calculated to mislead the jury. (See 1 Mo. 341; 6 Mo. 64; 12 Mo. 381.)

Hovey, for respondent.

I. The declarations admitted could do no harm; they but

Tucker v. Frederick.

corroborated the statement of plaintiff's own witness, that if defendant ever had an idea of removing her goods or changing her domicile, she had abandoned the idea before the attachment. (15 Mo. 244.) The court properly instructed the jury.

RICHARDSON, Judge, delivered the opinion of the court.

This suit was commenced by attachment on the ground that the defendant was about to remove out of this state with intent to defraud, hinder or delay her creditors, and also that she was about to remove out of the state with intent to change her domicile. The defendant, by plea, put in issue the truth of the affidavit. On the trial of the plea in abatement the plaintiff introduced evidence tending to show that, two or three days before the commencement of the suit, the defendant offered to sell the lease of the house she occupied and a portion of her furniture, and stated at the time that she intended to remove to the territory of Kansas; also, that she spoke of removing to Monticello, a town in Kansas, for the purpose of keeping a boarding-house, and that, a few days after the attachment was served, she did remove to Monticello, where she has ever since resided with her family. All the plaintiff's evidence bore on the allegation in the affidavit that the defendant was about to remove out of the state with intent to change her domicile. The defendant was allowed to prove by one witness, that, prior to the attachment, she proposed to sell out to him, and stated that she desired to apply a portion of the proceeds to the payment of the plaintiff's demand; and by another witness, that, after the attachment had been levied, she told him she would not have removed to Kansas but for the attachment, which had broken her up.

This evidence was improperly admitted, for the law authorizes an attachment on the simple ground that the defendant was about to remove out of the state with the intention of changing her domicile, without regard to her purposes in reference to her creditors; and, therefore, if she intended to go to Kansas with the view of residing there, it was imma-

Irwin v. Chiles.

terial whether or not she intended to apply a portion of the proceeds of her property to the payment of the plaintiff's debt; and her declarations made after the attachment were clearly inadmissible to explain away the effect of previous declarations.

The other judges concurring, the judgment will be reversed and the cause remanded.



IRWIN *et al.*, Plaintiffs in Error, v. CHILES, Defendant in Error.

1. A defendant can not introduce evidence to support a defence not set up in his answer. If the evidence discloses a defence not set up in the answer, the court may, in furtherance of justice and on such terms as may be fit, allow the defendant to amend his pleading so as to make it conform to the facts in proof, provided the amendment does not substantially change the defence.

Error to Clay Circuit Court.

The facts sufficiently appear in the opinion of the court.

Ryland & Son, for plaintiffs in error.

Hovey and Sheley, for defendant in error.

RICHARDSON, Judge, delivered the opinion of the court.

This suit was commenced under the act of 1849, and having been tried without a jury, it was necessary that the court should find the facts on which its judgment was founded.

The plaintiff had recovered a judgment against Christopher L. Chiles in his lifetime, and the object of this suit was to subject to the payment of his judgment a tract of land which it is alleged in the petition was purchased by said Christopher of Henry T. Chiles. It is also alleged that said Christopher paid his own money for the land, amounting to three thousand dollars, but, for the purpose of cheating his creditors, and especially for the purpose of defeating the

Irwin v. Chiles.

plaintiff in the collection of his demand, which accrued before that time, caused the conveyance to be made to his son, Richard B. Chiles, the defendant, who was at that time a minor. The defendant, in his answer, claimed the land as his own, alleging that he had purchased it of Henry T. Chiles. He denied that his father "purchased or contracted for the land either directly or indirectly, or that the land was paid for with the money of Christopher L. Chiles, or purchased for his use either directly or indirectly." He further averred that being under age he advised with his father about the purchase, who was present a part of the time the negotiation was going on, but denied that the purchase was made with his father's money or that his father gave him the money or any part of it; that having been to California, he had by his own exertions made the money which paid for the land. The court found "that in the winter of 1849 and 1850, in the state of California, Henry T. Chiles sold to Christopher L. Chiles the above described land for the sum of three thousand dollars cash, and, upon payment of the purchase money, said Henry executed to said Christopher a title bond for said land, binding himself to make a deed to the same on their return to Missouri; that, upon the purchase of said land, the said Christopher agreed with the defendant that, in consideration that the defendant had made most of the money that paid for the land, and the further consideration that said defendant would return and assist said Christopher to return with his family to Missouri, that defendant should have said land. The court further finds that the defendant was at the time a young man not yet twenty-one years of age, and that his father had given him his time and dealt with and recognized him as an adult; that the defendant, while in California acting for himself with his father's consent, accumulated upwards of three thousand dollars, and that said land was purchased in fact with the money of the defendant, and that defendant did afterwards, in the spring of 1850, return with and assist his father to return with his family to Missouri, and that this agreement was not made

Cloud v. Ivie.

for the purpose of defrauding the plaintiff or any other creditor."

It is unnecessary to notice the evidence; for, conceding that it was sufficient to warrant the finding, it is manifest that the finding was not made on the issues raised by the pleadings. The defendant did not pretend in his answer that he had purchased the property of his father, or had any agreement him on the subject, but on the contrary averred that his father did not make the purchase directly or indirectly, and insisted that he had made the contract and concluded the purchase himself directly with Henry T. Chiles without his father's means or agency.

It is settled by the decisions of this court that a defendant can not introduce evidence to support a defence not set up in his answer; (*Winston v. Taylor*, 28 Mo. 82; *Cowden v. Cairns*, 28 Mo. 471;) and a party is not entitled to a judgment on a finding of facts different from any theory of the case set up in the petition or answer. The judgment ought not to be grounded on a defence not made in the answer, and whenever a defence is disclosed by the evidence different from that set out in the answer, the court may, at any time, in furtherance of justice, and on such terms as may be just, amend any pleading by conforming it to the facts proved, provided the amendment does not substantially change the claim or defence. (2 R. C. 1855, § 3, p. 1253.)

Judge Scott concurring, the judgment will be reversed and the cause remanded.

CLOUD, Plaintiff in Error, v. IVIE, Defendant in Error.

1. The statute of frauds does not embrace resulting trusts.
2. Where two proprietors of land agree that one of them shall enter under the graduation law of Congress an adjoining tract of government land, each furnishing one-half the sum required to pay the graduation price, and that the one who enters shall convey one-half the tract to the other, and the entry is made under this agreement; *held*, that there will be a resulting trust as to one-half of the land entered.

Error to Newton Circuit Court.

The petition in this case is substantially as follows: Plaintiff states that he is the owner of and occupies for agricultural purposes a certain forty acre tract; that on the — day of —, 1858, a certain forty acre tract of government land [describing it] was subject to entry at the graduation price of one dollar per acre; that, the same is adjacent to plaintiff's farm above described; that, on the day and year aforesaid, the defendant agreed with plaintiff that if plaintiff would furnish him twenty dollars he would enter the forty acres above described and make to plaintiff a good deed of conveyance of the south half thereof; that, confiding in the integrity of defendant and believing that he would perform his part of the contract, plaintiff delivered to defendant, for the purpose aforesaid, the sum of twenty dollars; that, confiding in the integrity of defendant, he proceeded to prepare a portion of the south half of the lot aforesaid for cultivation, clearing off the brush, timber, making rails, &c.; that defendant did enter said tract, but has refused to make to plaintiff a deed as agreed.

The evidence adduced supported the petition. The court instructed the jury as follows: "Admitting all the evidence in the case to be true, the plaintiff can not recover."

The plaintiff took a nonsuit, with leave, &c.

Hendrick, for plaintiff in error.

I. The court erred in instructing the jury. The petition was sufficient. The evidence sustained the petition.

NAPTON, Judge, delivered the opinion of the court.

The instruction given by the court, which caused the plaintiff in this case to take a nonsuit, does not disclose the grounds upon which it proceeded. Whether it was based upon a construction of the statute of frauds, or upon the act of Congress under which the land was entered, does not appear.

The statute of frauds does not embrace resulting or im-

plied trusts. The entry of land by one in his own name with the money of another is a resulting trust and may be proved by parol.

There is nothing in the bill of exceptions to show under what act of Congress the land was entered. It may be conjectured that the graduation law of 1851 was the act under which the entry was made, and it is possible that the restrictions of that law occasioned the instruction which the court gave, though this is mere conjecture, for there is nothing in the record or in the brief filed by the counsel to throw any light upon the subject. We do not perceive any thing in the agreement between the plaintiff and defendant which violates the spirit of the act of Congress. Whether the defendant could with propriety take the oath required by that act is a matter not involved in the present controversy. The land was entered; it adjoined both plaintiff and defendant, and under the act either could have entered the entire tract. The agreement was to contribute equal portions of the purchase money and to divide the land, each retaining the half adjoining his farm. There was nothing in such an arrangement calculated to defraud the government or to evade any restriction in the graduation act. It was equitable and just to both parties and did no injury to the government. Whether such an entry could be made consistently with a literal construction of the provision of the act of Congress is a matter, as we have said, which concerned alone the defendant's conscience and the government; though it is plain that, so far as the government was concerned, her interests could not be affected by the agreed division of the land between the two, either of whom might, by a literal compliance with the law, have entered it all.

The instruction of the circuit court was merely a general one, that the plaintiff was not entitled to any relief. No proposition of law was decided, and it is merely a matter of conjecture as to what was the view entertained by the court. Under these circumstances, we shall reverse the judgment and remand the case. The other judges concur.

FARRINGTON *et al.*, Defendants in Error, v. McDONALD,
Plaintiff in Error.

1. In a suit upon a promissory note, if the defendant be personally served with process, he must answer the petition on or before the second day of the term at which he is bound to appear. (R. C. 1855, p. 1235, § 24.) This rule applies where an attachment is sued out in aid of such suit, in case there has been service of the writ of attachment in time for judgment at such term.

Error to Vernon Circuit Court.

On the 22d day of July, 1858, the plaintiffs filed their petition against defendant on a promissory note. Summons in the usual form issued July 23, 1858. This writ was served October 5, 1858. Before it was served, the plaintiffs filed an affidavit in which they alleged that the defendant was about fraudulently to convey or assign his property or effects so as to hinder or delay his creditors; that he had fraudulently conveyed or assigned his property or effects so as to hinder or delay creditors; that he had absconded or absented himself from his usual place of abode in this state so that the ordinary process of law could not be served upon him. Bond being given, a writ of attachment issued on the 5th of August, 1858, and property of the defendant was attached August 11, 1858. At this time no personal service was had upon defendant. At the instance of plaintiffs an order of publication was made. On the 5th of October, 1858, the writ of attachment was personally served on defendant. On the 8th day of November, 1858, the circuit court met, being the regular term of the court. On said 8th of November, 1858, the defendant filed a plea in the nature of a plea of abatement. By this plea the defendant alleged that he had not absconded or absented himself from his usual place of abode in this state so that the ordinary process of the law could not be served upon him. On the 4th day of the term the defendant filed a second plea in abatement. On the same day the plaintiff moved the court to strike out said plea, on the

Farrington v. McDonald.

ground that it had been filed out of time. The court granted the motion. On the same day the court rendered judgment by default against defendant, and refused to grant him leave to file a plea in bar, or to dissolve the attachment.

Johnson & Ballou, for plaintiff in error.

I. The defendant was not required to plead on the second day of the term. The court should have allowed him to file a plea in bar on the fourth day. The court erred in treating defendant's first plea as a nullity and rendering a judgment by default; also in overruling the motion to dissolve the attachment. There was a double service of the attachment.

Freeman, for defendants in error.

I. Defendant was bound to file his answer on or before the second day of the term. There was no answer of any kind filed until the fourth day. The circuit court did right in striking out the plea in abatement. No reason was given, or cause shown why it was not filed sooner. The court properly treated the first plea as a nullity. It did not controvert the matters charged in the affidavit for an attachment.

NAPTON, Judge, delivered the opinion of the court.

This was a suit upon a promissory note and was commenced in the ordinary way; but subsequently an attachment was sued out. There was personal service of the writ in time for a judgment at the first term. The only question in the case is, whether the defendant was bound to plead or answer on or before the second day of the term, as he unquestionably would have been if no attachment had been sued out; and upon this point, we think, the decision of the circuit court correct. We have not found any thing in the letter or spirit of the attachment law which requires a suit, under these circumstances, to progress with less speed than it would if no attachment had been sued out. On the contrary, the forty-second section of the act says that "when

Dulle v. Deimler.

the defendant has been served with the writ, or appears to the action, the proceedings in the cause shall be the same as in actions instituted by summons only."

Judgment affirmed; the other judges concur.

DULLE, Defendant in Error, v. DEIMLER, Plaintiff in Error.

1. A special adjourned session of a court, although it may with propriety be said to be a continuance of the regular term, since its object is the completion of the business of the regular term, is a separate and distinct term of the court. Should such a special adjourned term be appointed and a cause be continued thereat at the cost of the party applying for such continuance, this order, properly construed, would embrace the costs of such adjourned term only and not those of the previous regular term.
2. Should the clerk in such case, in issuing execution for costs, include the costs of the regular term, the court may at a subsequent term order a re-taxation of the costs.

Error to Cole Circuit Court.

The facts sufficiently appear in the opinion of the court.

Parsons, for plaintiff in error.

I. The court having adjourned over from August until November, all its proceedings in the latter month were but the proceedings of the regular August term. The court was authorized to hold the court in November in continuance of the regular term. (R. C. 1855, p. 540, § 48.) No additional process was required to enforce the appearance of witnesses or parties. The effect of the adjournment was the same as if the court had adjourned over from Saturday until the following Monday. The judgment for costs covered the costs that accrued in August. (R. C. 1855, p. 1260.) The court had no power to alter, amend or review its judgment at a term subsequent to that at which the judgment was rendered. (Hill v. City of St. Louis, 20 Mo. 586.) The judgment for costs having been rendered at the August term, 1857, could not be revised or modified at the August term, 1858.

Dulle v. Deimler.

Gardenhire & Lay, for defendant in error.

I. The continuance granted to Dulle rendered him liable only for the costs occasioned thereby—the costs of the term at which the continuance was granted. The costs of the August term were occasioned by want of time to try the case. Dulle was then ready for trial. Having ultimately gained the case, it would be manifestly wrong to make him pay the costs of that term. The payment of the costs of the adjourned session of November by Dulle will place his adversary in precisely the same condition as if no continuance had been granted.

II. The “special adjourned” session of November, though in continuance of the regular term, was a distinct term recognized by law as such, and unlike an adjournment from day to day, or from Saturday till Monday, during a regular term. There was no court between the termination of the regular term in August and the commencement of the adjourned session in November.

III. The power of the court to set aside its own judgment at a subsequent term is not involved in this case. The continuance was at Dulle’s cost, but what costs were included in the order was not specified. The court gave one construction; the court, on the motion to retax, gave another.

NAPTON, Judge, delivered the opinion of the court.

At a special adjourned term of the circuit court of Cole county, in November, the plaintiff, upon his application, obtained a continuance at his costs, and the clerk in taxing the costs under the order included the costs of the regular August term of which the November term was a continuance. At a subsequent term, and after a verdict and judgment for the plaintiff, the court, upon motion, directed the clerk to retax the costs, so as to exclude from the costs of the continuance in November the costs of the regular August term. This opinion was excepted to, and its propriety constitutes the only question in the case.

Dulle v. Deimler.

If the November term could be considered as a part of the August term in the same sense and to the same extent that the second week of a regular term is regarded as a part of that term, notwithstanding an adjournment from Saturday until Monday, the costs accruing in August as well as November would undoubtedly fall upon the party procuring a continuance. But we do not so consider it. A *special* adjourned session of a court is as much a distinct and separate term as a special term called to try criminals, or a regular term which is fixed by law. During a regular term of the court, parties are required to be ready to proceed with the trial on any day which may suit the convenience of the court, subsequent to the day for which the case is docketed; but after the court has adjourned to the next regular term, or to a special adjourned term, as a matter of course no such liability to be called in the interim exists. Although an adjourned special term may with propriety be said to be in continuance of the regular term, because its object is to complete the business which the court is unable to go through with at the regular term, yet it is a distinct and separate term, and so it is the practice to note it in the record kept by the clerk. That parties and witnesses are required to appear without any additional process, may be so; but this is because of the character of the order of adjournment, which is, for convenience, expressly or impliedly made to embrace this additional requisition. As the parties are in court and their witnesses, or presumed so to be, they are subject to the orders of the court as to the time when they shall appear for a hearing. The same thing might be done where the adjournment is over to the next regular term, if the court thought proper to make such an order.

There is no express provision of the statute on this subject, but general principles of equity and the spirit of the practice act seem to warrant the order of the circuit court in this case. The costs of the adjournment in August, because of the inability of the court to finish the business of the term, ought not to fall upon one party more than ano-

Boggs v. Caldwell County.

ther, neither being in fault and neither responsible for the adjournment. Justice requires that the adjournment should operate as a general continuance, the costs to abide the event of the suit.

We do not perceive any difficulty in the power of the court to have the costs retaxed. Such an order constituted no revision or alteration of a judgment rendered at a previous term. The court was simply called upon to give a construction to its own order, as it related to costs, and if the clerk was mistaken, it was the right and duty of the court to correct the error.

Judge Scott concurring, the judgment is affirmed.

BOGGS, Respondent, v. CALDWELL COUNTY, Appellant.

1. A county court has the power to order an index to be made to the books in which deeds are recorded and to allow a reasonable compensation therefor out of the county funds.
2. In order that such an order may be valid and binding upon the county, it is not, it seems, necessary that it should be entered of record. A verbal direction from the justices on the bench or from the presiding justice would be sufficient.
3. At the May term, 1857, of the Caldwell county court an account was presented for allowance against the county. The account was disallowed. At the March term, 1858, by leave of court, testimony touching the same account was introduced. The court having heard the testimony, "adhered to its former decision." An appeal was then taken to the circuit court. *Held*, that the appeal was well taken; that the rejection of the claim at the May term, 1857, was not like a judgment in a suit between individuals which the court could not open at a subsequent term; that the county court could waive an advantage the county might have.
4. The act of the general assembly of January 21, 1857, (Sess. Acts, 1857,) p. 746,) directing the county court of Caldwell county to audit and allow one W. F. Boggs, for services rendered in making an index of deeds and mortgages of record in said county at the rate of ten cents for each name, and to draw their warrant in favor of said Boggs for the sum thus ascertained to be due, and declaring that it shall be the duty of the county treasurer to pay said warrant out of any money appropriated for county expenditures, is unconstitutional and void.

Appeal from Caldwell Circuit Court.

At the May term of 1857, of the Caldwell county court Wilbur F. Boggs presented for allowance against the county an account for three hundred and ninety-six dollars and ten cents for making an index to the record of deeds. The account was "disallowed." At the March term, 1858, he asked and obtained leave to introduce testimony touching the same account. The court having heard the testimony adhered to its former decision. An appeal was prayed and granted to the circuit court. At the trial the plaintiff proved by a witness that the court directed the index to be made. The defendant objected to the admission of this testimony on the ground that the records of the court should be introduced to prove such an order. An act of the general assembly approved January 21, 1857, was introduced against the objection of the defendant. Said act is as follows: "Sec. 1. The county court of Caldwell county shall audit and allow Wilbur F. Boggs, for services rendered in making a direct and inverted index of deeds and mortgages recorded and of record in said county, at the rate of ten cents for each name. Sec. 2. The county court of said county shall draw their warrant in favor of said Wilbur F. Boggs for the sum thus ascertained to be due him; and it shall be the duty of the county treasurer of said county to pay said warrant out of any money appropriated for county expenditures." The cause was submitted to the court without a jury. The court found for the plaintiff and allowed him one hundred and fifty dollars.

E. B. Ewing, (attorney general,) for appellant.

I. The plaintiff had no legal demand against the county. The court made no order directing the index to be made. If it had done so, it would have been a nullity for want of authority of law. (26 Mo. 276.) It is the duty of the clerk to make and keep an index of deeds, &c. The claim is *res adjudicata*. The decision of the county court in May, 1857,

Boggs v. Caldwell County.

is conclusive. No appeal was allowable from it; if allowable, it was not taken in time. If the county was liable, it was only so liable by virtue of the act of the legislature read in evidence. That act is unconstitutional. It was an unconstitutional interference with the administration of justice. (*State v. Fleming*, 7 Humph. 183; *The State v. Sloss*, 25 Mo. 293; 2 Pet. 657; 9 Cranch, 43.) It also took private property for public use without making any provision for compensation. The counties are corporations having rights of property. The act is also retrospective. (2 McLean, 212; 10 N. H. 387.)

Gardenhire, for respondent.

I. The county court had the right to employ plaintiff to make out the index. The rejection of the plaintiff's account at May term, 1857, is no bar to his recovery. It was not interposed as such at the March term, 1858. (See *County of Boone v. Corlew*, 3 Mo. 10.) No specific objection was made to the admission of the act of the legislature. (23 Mo. 438.) The act had no effect whatever in the decision of the case. No instruction was asked.

NAPTON, Judge, delivered the opinion of the court.

There can be no reasonable doubt, we think, that the county courts have the power to order an index to be made to the books of recorded deeds, and to allow a reasonable compensation for the work out of the county funds. Although it is the duty of the recorders to keep up their indexes without any compensation from the county, and their compensation is provided by law to come from the persons having their deeds recorded, yet in the course of time it may happen that these books become unfit for use and have to be renewed. The county court is specially entrusted with the duty of seeing to the preservation of any property belonging to the county, and they necessarily have the right of appropriating a sufficient sum from the county treasury to secure the proper execution of these duties. Undoubtedly

the more formal and usual mode of doing this is by an order of the court, entered on its records; but in a matter relating to the books and papers in the office of their clerk, such formality is not, we apprehend, necessary. A verbal direction from the judges on the bench, or from the presiding judge of the court alone, would certainly warrant a prompt compliance on the part of the clerk, and lay the foundation of a just claim against the county for a reasonable compensation. But in this case, the absence of a formal entry on the record was not insisted on by the county court, nor did it constitute, so far as this record shows, any part of their reason for rejecting this claim. The order was proved orally by the judges on the trial in the circuit court, and although there can be no doubt that the records of a court can alone be appealed to for the purpose of showing any proceeding necessary to appear on the record, we do not regard an order of this nature, relating to the books in the office, as one which necessarily had to appear by record. If the judges of the court had ordered ice to be procured during the session of the court, or benches to be constructed for the convenience of visitors or bystanders, a compliance with such orders would constitute a claim against the county, whether the court thought proper to enter it on the record or not. There was, however, no dispute in this case but that the work was done and done in pursuance of an order of the court.

We do not see any objection to an appeal from the rejection of this account at the March term in 1858, although it had been previously rejected at a prior term. The county court permitted the plaintiff to introduce new proof, and gave him to understand that, by such permission, they were still open to conviction. He could have appealed from the original order of rejection, but when he presented his claim a second time by leave of the court, no objection was interposed of *res adjudicata*. The objection, if it would have been available, may be considered as waived. The rejection of the claim was not like a judgment in a suit between individuals, which the court could not on its own motion open

at a subsequent term, but the county court were the commissioners or agents of the county, and could, on behalf of the county, waive any advantage the county might have.

Upon the trial of this case in the circuit court, an act of the legislature was offered, which ordered the county court to pay the plaintiff his claim out of the county treasury. The reading of the act was objected to, for what reason is not stated. The law was read and this is the principal error assigned for a reversal of the judgment. It is insisted that the law was unconstitutional, and of this we entertain no doubt; but the point is not saved. We do not understand that a question of the constitutionality of a law can be brought to this court in this way. We can not see that the court thought the law a valid one; on the contrary, it is quite manifest that the court, although the law was allowed to be read, utterly disregarded it. The court may have supposed it hardly respectful to the legislature to refuse to hear one of their laws read, whether constitutional or unconstitutional. No opinion of the court was asked concerning its validity; no instruction was offered. It does not appear but that the objection to its reading related entirely to its authenticity, and the court may have been satisfied on this point. A mere general objection is interposed to its reading in the court-house. But even if such general objections might be regarded by this court as sufficient, in some cases, to bring up the question of the validity of a law, the record in this case shows that, whatever opinion the court may have entertained about the law, it had no influence on the decision of the case. The judgment was not in accordance with the law—the law requiring the court to allow the plaintiff three hundred and ninety-eight dollars, and the court only allowed one hundred and fifty. It would be folly for this court to reverse a judgment for a mere abstract error, if error was really committed in the matter.

Judge Scott concurring, judgment affirmed.

BURKE'S ADMINISTRATRIX, Plaintiff in Error, v. WALROUD,
Defendant in Error.

1. The Kansas city court of common pleas, established by the act of the general assembly approved November 20, 1855, (Sess. Acts, 1855, Adj. Sess. p. 60,) does not possess probate jurisdiction.

Error to Kansas City Court of Common Pleas.

Bouton and Ryland & Son, for plaintiff in error.

I. The Kansas city court of common pleas had jurisdiction of probate matters. It could grant letters of administration.

RICHARDSON, Judge, delivered the opinion of the court.

The only question in this case is whether the Kansas city court of common pleas has probate jurisdiction. The sections of the act creating the court, which define its jurisdiction, are the first and nineteenth. (Sess. Acts, 1855, Adj. Sess. p. 60.) By the first section it is invested with "the same jurisdiction, *civil*, original, concurrent and appellate, of *civil causes* within said township [Kaw] as the circuit and probate courts within and for the county of Jackson;" and the nineteenth section declares that it "shall have concurrent original jurisdiction with the circuit court of Jackson county in all *civil* actions within the township of Kaw, and actions against boats and vessels; concurrent superintending control with said circuit court over justices of the peace within said township of Kaw, and appellate jurisdiction from their judgments, and concurrent original jurisdiction with justices of the peace in all civil actions in said township."

It will be observed that the jurisdiction of the court, whether original or appellate, concurrent or exclusive, is limited to civil actions, and these words would not ordinarily be construed to embrace the power of granting letters testamentary or of administration. There is no difficulty in reconciling

the reference in the first section to the "probate court of Jackson county" with the denial of probate jurisdiction to the Kansas court of common pleas. The probate court of Jackson county was established by an act entitled "A bill to establish a probate and common pleas court in Jackson county," approved February 13, 1855. (Sess. Acts, 1855, p. 497.) The fourth section of the act gives the court "exclusive original jurisdiction of all matters pertaining to the administration of estates of deceased persons, or the estates of minors, as well as the appointment of guardians and curators, and concurrent jurisdiction with justices of the peace and the circuit court upon all actions upon notes or accounts for the recovery of money, when the amount claimed exceeds fifty dollars, and does not exceed one thousand dollars exclusive of interest." It will be seen that the court has a double jurisdiction—for the transaction of probate business, and the trial of "*civil actions*." But the common pleas and probate business are kept separate. Hence, though the court is allowed four terms a year, the seventh section of the act prohibits the court from transacting common pleas business except at the spring and fall terms. There are many reasons affecting the public interests why the probate business of a county should not be distributed between several courts; and, as full effect can be given to the first section of the act establishing the Kansas court of common pleas without extending the jurisdiction of the court to include probate matters, we think it should be construed as referring only to the common pleas business as distinguished from probate business—a distinction clearly recognized by the act that created the probate court of Jackson county.

The judgment will be affirmed with the concurrence of the other judges.

Platt v. Smith.—Backster v. Hall.

PLATT, Respondent, v. SMITH, Appellant.

1. The Kansas city court of common pleas has no jurisdiction to enforce mechanics' liens. (Ashburn v. Ayres, 28 Mo. 75, affirmed.)

Appeal from Kansas City Court of Common Pleas.

Otter and Smith, for appellant, cited Ashburn v. Ayres, 28 Mo. 75.

Ryland & Son, for respondent.

SCOTT, Judge, delivered the opinion of the court.

The case of Ashburn v. Ayres, 28 Mo. 75, determines that the Kansas court of common pleas has no jurisdiction to enforce mechanics' liens. When this suit was instituted, the law in relation to the jurisdiction of the court was the same as when the case, to which reference has been made, was brought. Reversed; the other judges concur.



BACKSTER, Plaintiff in Error, v. HALL, Defendant in Error.

1. The supreme court will not review the verdicts of juries on the ground that they are against the weight of evidence.

Error to Lafayette Circuit Court.

Ryland & Son, for plaintiff in error.

Hovey, for defendant in error.

NAPTON, Judge, delivered the opinion of the court.

This case turns entirely upon a question of fact, which the court below found against the plaintiff, and we are called upon to set aside the verdict as not warranted by any evidence in the case.

There is no controversy that, *prima facie*, the defendant,

State v. Montgomery.

as one of the makers of the note, is liable to the plaintiff who was the endorser, but if the plaintiff and defendant understood themselves to be co-securities for the other maker of the note, Kennedy, then this action can not be sustained, as the defendant has paid his half of the note. Whether such an understanding existed was a question of fact for the jury or court which tried the case, and we can not say there was no evidence from which such an understanding could be inferred. When we consider the practice of the bank in requiring notes in a particular form for discount, the anxiety of the plaintiff in relation to the original note of five hundred dollars, which, under the circumstances, would seem to have been unnecessary upon the supposition that he believed the defendant to stand between him and all liability, and the fact that the plaintiff and Kennedy went into the country to procure the defendant's signature, all three being present when the note was signed, the inference is not unreasonable that the plaintiff and defendant intended and believed themselves to be sharing equally the responsibility attending the transaction. However this may be, the case is not one in which this court feels itself under obligation to interfere. The instructions being right, the judgment must be affirmed. The other judges concur.



THE STATE, Respondent, v. MONTGOMERY, Appellant.

1. A general verdict against a defendant in a criminal case will authorize a judgment thereon if there is a single good count in the indictment.
2. It is competent in a criminal case, as affecting the credibility of a witness, to inquire into the state of his feelings towards the party against whom he is called upon to testify; this inquiry can not, however, be made concerning the witness' feeling towards the husband of such party.

Appeal from Cedar Circuit Court.

Johnson & Ballou, for appellant.

E. B. Ewing, (attorney general,) for the State.

RICHARDSON, Judge, delivered the opinion of the court.

The defendant was indicted for disturbing an assembly met for religious worship, under the thirtieth section of the eighth article concerning crimes and punishments. (1 R. C. 1855, p. 630.)

The defendant's counsel concedes that the first count in the indictment is good, but insists that the judgment should be arrested because the verdict is general, and the second count is bad. But there is nothing in that objection, for the practice seems to be settled that the verdict in a criminal case will authorize a judgment upon it, if there is a single good count in the indictment to support it. (State v. Jennings, 18 Mo. 435; State v. Bean, 21 Mo. 269; 1 Chitty's Crim. Law, 639.)

One of the witnesses called by the State was allowed on his cross-examination to testify concerning the state of his feelings towards the defendant, but the court sustained the objection to the defendant's offer to prove that the witness was unfriendly to her husband. It is always competent, as affecting the credibility of a witness, to inquire into the state of his mind in respect to the party against whom he is called, but we have seen no authority that permits the inquiry to be made concerning the witness' feelings in regard to other persons, no matter in what relation, however else they may stand to the party. If the rule includes a husband or wife, it would embrace father, mother, brother or sister, and other relatives remotely of kin, and there would be no proper or defensible limit if the inquiry was allowed so wide a range.

In order to sustain an indictment like the one in this case, it is of course necessary to prove that an assembly was disquieted or disturbed, and the fact is one to be proved by the jury; but it is certainly not necessary to prove that every person in the assembly was disturbed, for that could only be done by calling as witnesses all who were present. No rule can be laid down as to the number of persons in a congregation whom it is necessary to prove were disturbed in their

Beattie v. Lett.

worship; and though, perhaps, a case would not be made out by showing that only one or two persons in a congregation were disturbed, yet the real question to try is a practical one, and the jury, from all the evidence, will be able to determine whether an offence has been committed.

The instructions that were given presented the case fairly to the jury, and those which were refused were properly refused. The other judges concurring, the judgment will be affirmed.



BEATTIE *et al.*, Defendants in Error, v. LETT *et al.*, Plaintiffs in Error.

1. A person to whom a negotiable promissory note has been endorsed may maintain an action thereon in his own name, although it was endorsed to him merely for collection. In a suit on such a note by an endorsee the caption of the petition was as follows: "A., to the use of B., plaintiff, v. C., defendant." In the body of the petition the plaintiff alleged title in himself by endorsement from B. *Held*, that the words in the caption "to the use of B." might be regarded as mere surplusage.

Error to Holt Circuit Court.

The facts sufficiently appear in the opinion of the court.

Patterson & Loan, for plaintiffs in error.

Shackelford & Turner, for defendants in error.

RICHARDSON, Judge, delivered the opinion of the court.

The title of the cause in the caption to the petition is as follows: "Armstrong Beattie and James M. Wilson to the use of B. W. Lewis & Bros., plaintiffs, against Henry C. Lett and John B. McAllister, defendants." The petition then states that the defendants executed and delivered to B. W. Lewis & Bros. their certain negotiable promissory note therewith filed, which is particularly described; that said B. W. Lewis & Bros. assigned by endorsement and delivered

Beattie v. Lett.

the same to William C. Boon, who assigned by endorsement and delivered the same to the plaintiffs; that the note was duly protested for nonpayment, and that afterwards a partial payment was made, but that the residue was unpaid, for which they asked judgment. The defendants demurred because the suit was brought to the use of B. W. Lewis & Bros., though it appeared from the petition that they had assigned the note to Boon, who had endorsed it to the plaintiffs; and also because the petition did not set out the christian names of B. W. Lewis & Bros.

As the note in this case was negotiable, if it had returned to the possession of B. W. Lewis & Bros. they would have been regarded, until the contrary appeared, as the *bona fide* holders and owners thereof, and would have been entitled to recover, notwithstanding the endorsement on it, whether they had originally endorsed it for value or for the mere purpose of collection, "without producing any receipt or endorsement back from either of the other endorser." (Edwards on Bills & Prom. Notes, 271, 278; Story on Prom. Notes, § 452; Glasgow v. Switzer, 12 Mo. 395; Picquet v. Curtis, 1 Sumn. 478.) If, on the contrary, the plaintiffs retained the possession of the note, they had a right to maintain an action on it in their own names, although it may have been endorsed to them merely for collection, because they were trustees of an express trust and had the legal title to the note. (Webb v. Morgan, 14 Mo. 428; R. C. 1855, § 2, p. 1217.) The words, then, "to the use of B. W. Lewis & Bros.," in the caption, were mere surplusage and might have been stricken out without affecting the petition.

The demurrer was properly overruled, and the judgment will be affirmed; the other judges concurring.

Gillespie v. Gillespie.—Bennett v. Pound.

GILLESPIE, Respondent, v. GILLESPIE, Appellant.

1. Judgment affirmed.

Appeal from Dade Circuit Court.

Wilkes, Crawford, McDowell and Stemmons, for appellant.

Coffee and Ewing, for respondent.

NAPTON, Judge, delivered the opinion of the court.

The testimony upon which the decree in this case was based is not of such a nature as to authorize, in our view of it, any interference on the part of this court. No point of law is presented by the record. A review of the evidence could lead to the settlement of no principle or precedent; it is very contradictory, and the circuit court, before whom the witnesses appeared, being satisfied, we do not feel ourselves competent to interfere.

Judgment affirmed. The other judges concur.



BENNETT *et al.*, Respondents, v. POUND *et al.*, Appellants.

1. A., the payee of a non-negotiable promissory note, endorsed the same in blank and delivered the same to B. in satisfaction of a debt due B. Held, that B. might recover in an action in his own name against the maker without having an assignment written above the endorsement.
2. An action can be maintained in the name of a holder of a non-negotiable promissory note transferred merely by delivery.

Appeal from Newton Circuit Court.

The facts sufficiently appear in the opinion of the court.

Edwards and Ewing, for appellants.

I. The court erred in permitting the note to be read in evidence. The note was endorsed in blank and said blank was not filled up. The same rule does not apply as in case

Bennett v. Pound.

of negotiable paper. The holder of a non-negotiable note with a blank endorsement thereon can not maintain an action thereon in his own name without filling up the blank. (3 Mo. 9.)

Sherwood and *White*, for respondents.

RICHARDSON, Judge, delivered the opinion of the court.

Cloud and Graham were the owners of a non-negotiable promissory note, which had been executed to them by the defendants, and being indebted to the plaintiffs they endorsed the note in blank and delivered it to plaintiffs' agent in satisfaction of their debt. The plaintiffs then instituted a suit upon it against the defendants and alleged in their petition that the note had been assigned by endorsement and delivered to them by the payees, and that they were the owners and holders thereof. The blank endorsement was never filled up by an assignment to the plaintiffs, and the only question is whether they can recover without first writing an assignment above the endorsement.

The principle decided in the case of *Boeka v. Nuella*, 28 Mo. 180, will determine this one. In that case it was observed that a party claiming to be the owner of a note transferred merely by delivery had only an equitable title to it, and that formerly he could not maintain an action at law upon it in his own name, and was therefore compelled to bring suit in the name of the payee to his use, or file a bill in equity; but that the practice act of 1849 abolished the distinction in the forms of actions so that under the present system which requires every action to be prosecuted in the name of the real party in interest, except as provided in the second section of the second article of the practice act (R. C. 1855, p. 1217) an action can be maintained in the name of the holder of a note transferred to him merely by delivery.

The judgment will be affirmed, the other judges concurring.

THE STATE, Appellant, v. WELCH, Respondent.

1. In an indictment founded on the fifteenth section of the second article of the revenue act of 1857, (Sess. Acts, 1857, Adj. Sess. p. 79,) for delivering to the assessor a false and fraudulent list of taxable property, it must appear in what respect the list delivered is false and fraudulent; the indictment must set out, in terms of general description at least, the taxable property owned by the defendant and fraudulently omitted in the list delivered.

Appeal from Webster Circuit Court.

The indictment in this case is as follows: "The grand jurors for, &c., &c., present that David Welch, late of, &c., on, &c., at, &c., did then and there, when required by one of the assessors in and for the county of Webster, unlawfully fail to give a true list of all his taxable property as required by law, contrary to the form," &c. By the second count of the indictment it is charged that the defendant "did unlawfully deliver to the assessor a false and fraudulent list of his taxable property contrary to the form of the statute," &c. The court quashed this indictment on motion of the defendant.

E. B. Ewing, (attorney general,) for the State.

I. The indictment follows the statute and sets forth every fact and circumstance essential to an offence. It is sufficient to charge the offence in the words of the statute. (1 Chitt. C. L. 218; 7 Pet. 142.)

RICHARDSON, Judge, delivered the opinion of the court.

The indictment in this case was intended to be framed on the fifteenth section of the second article of the revenue act of 1857; (Adj. Sess. 1857, p. 79;) which is as follows: "If any person shall deliver to the assessor any false or fraudulent list, the property therein specified, and all that ought to have been listed therein, shall be taxed triple, and the offender shall moreover be subject to indictment for the

WITMAN v. FELTON.

fraud, and may be fined in any sum not exceeding five hundred dollars."

The second count of the indictment is bad, because it does not allege in what respect the list of taxable property delivered to the assessor by the defendant was false or fraudulent; and the first count is defective for the same reason, and also because it is not averred that the act or omission of the defendant was fraudulent. The indictment ought to set out, in terms of general description at least, the taxable property owned by the defendant and fraudulently omitted in the list delivered to the assessor; otherwise he might not be prepared at the trial to show that the property charged to have been omitted did not belong to him or was not taxable in his name.

The indictment was properly quashed and the judgment will be affirmed, the other judges concurring.



WITMAN *et al.*, Defendants in Error, v. FELTON, Plaintiff
in Error.

1. An agent has discharged his duty when he pays over to his principal money collected by him as agent; it is no concern of his whether his principal's title thereto is good or bad.
2. Where, in an action by a principal against an agent to recover money alleged to have been collected by him as agent, there is evidence showing that the defendant did collect the money as agent for the plaintiff, this evidence can not be rebutted by showing that the title of the plaintiff to such money is bad as against third persons.

Error to Cooper Court of Common Pleas.

The facts are sufficiently set forth in the opinion of the court.

Adams, for plaintiff in error.

I. The evidence offered by defendant to show that the money collected belonged to Fisher's estate was surely competent under the issues in the cause. It rebutted the idea

Witman v. Felton.

that the money was received under the power of attorney. The defendant denied the reception of the money as agent; he offered to prove that it belonged to a stranger. The reception of the money as agent under the power of attorney was the very issue between the parties. The strongest evidence that the money was not received under the power of attorney was that it belonged to the estate of Fisher, the former husband of the plaintiff, Mrs. Witman. The doctrine that an agent can not deny the title of his principal has nothing to do with this case. The reception of the money as agent is denied. Upon the issue whether the plaintiff's wife was entitled to the money in Prussia, as alleged in the petition, the best evidence was the written document referred to by the witness Epstein. Any other evidence was inadmissible until its nonproduction was legally accounted for. It was the duty of the plaintiffs to produce this writing.

Douglass & Hayden and *Draffen*, for defendants in error.

I. The evidence offered by the defendants, for the purpose of showing that the money collected by him in Prussia belonged to the estate of Fisher, was inadmissible in every point of view. The defendant has not the right to controvert the title of plaintiffs to the money he agreed to collect for them. An agent can not controvert the title to property entrusted to him either by asserting title in himself or a stranger. (Story on Ag. § 217; Story on Bailments, § 110, 112.) The defendant is estopped to deny the title of plaintiffs. (Stephen on Plead. 375; 1 Chit. on Plead. 347, 575.) It is admitted by the pleadings that the defendant became the agent of plaintiffs and agreed to attend to their interests in Prussia.

NAPTON, Judge, delivered the opinion of the court.

This was a suit between principal and agent. The latter had collected a sum of money for the former, under a power of attorney, and this action was brought to recover it. The defence was, that the money did not belong to the principal

Witman v. Felton.

and this was offered to be shown generally, and also by the production of a paper in possession of the plaintiffs. The proof was excluded by the court and this exclusion presents the only question in the case.

An agent has discharged his duty when he pays over to his principal the money he was authorized to collect. It is of no importance to him whether his principal's title to the money or property be good or bad. That is a matter which concerns third persons, who, if they desire to protect their interests, can easily do so, either before or after the termination of the controversy between the principal and agent. This principle of law is conceded, but it is said that the paper called for in this case, and which it was alleged would show that the money collected by the defendant belonged to third persons, was admissible to show that the money was not really collected under the power of attorney, and was not collected as agent for the plaintiffs. Of course this could be shown, and if there had been any offer to show this, there could be no doubt the evidence should have been admitted. But the mere fact that the money collected belongs to third persons has no tendency to disprove the allegation that it was collected as money of the principal, especially where the only proof previously introduced in the case was positive and unequivocal that the money was collected under the power of attorney and as agent for the plaintiffs. If the simple fact that the money does not really belong to the principal is sufficient to rebut, or entitled to any weight in rebutting the positive proof of agency, then such evidence must be legitimate in all cases of this kind, and in every suit between principal and agent, the latter can go into the question of the ownership of the property or money which he has collected, upon the vague presumption that the money or property was not obtained through the agency, simply because the principal did not have any right to it. Such a course would defeat all the rules of evidence, and practically annul the responsibility of agents.

Judgment affirmed. The other judges concur.

Young v. Montgomery.

YOUNG *et al.*, Defendants in Error, v. MONTGOMERY, Plaintiff in Error.

1. A parol agreement respecting the sale of land, of which there has been part performance, is not within the statute of frauds. Possession alone, without payment, is sufficient part performance to authorize a decree for a specific execution; but the possession must be under the contract and not a mere tenancy, or taken under some other contract; and the contract must be unequivocally established.

Error to Wright Circuit Court.

It is deemed unnecessary to set forth the facts more fully than they appear in the opinion of the court.

Riley, Edwards and Ewing, for plaintiff in error.

I. The court erred in excluding the testimony offered. (2 Mo. 109; 25 Mo. 63; Sugd. Mend. 135; 1 Blackf. 58; 5 Blackf. 383.)

Waddell, for defendants in error.

NAPTON, Judge, delivered the opinion of the court.

This was an action of ejectment to recover eighty acres of land in Pulaski county, and the defence set up in the answer was that there was a parol sale of the land to defendant, and the answer further prayed a specific performance and decree of title. Upon the trial, the plaintiffs showed title in their ancestor, and the defendant offered proof relative to the parol sale, but the proof was rejected. An exception was taken and the case brought here.

We can form no conjecture as to the grounds upon which the proof offered in this case was rejected. That there are cases of part performance of a parol agreement for the sale of land, which will take them out of the statute of frauds, is beyond doubt. Whether the present case is one of them or not, we can of course form no opinion from any information contained in this record. The defendant offered to prove a

Young v. Montgomery.

parol sale, a delivery of possession, and a payment of the principal part of the purchase money; but the proof was rejected and no other evidence given. It is well settled that possession alone, without payment, is sufficient part performance to maintain a decree for a specific execution; but the possession must be under the contract, and not a mere tenancy or taken under some other contract, and the contract must be unequivocally established.

It is useless, however, to undertake to go into this subject, one that is fully treated of in the elementary books and adjudged cases. The circumstances of the particular case must be fully disclosed in order to determine the applicability of general principles to them. Where there is an offer of testimony generally, unless the defence is totally inadmissible under any circumstances, it will save time and expense to let in the proof and then determine its relevancy and effect.

The other judges concurring, the judgment is reversed and case remanded.

[END OF JULY TERM.]

RULE OF SUPREME COURT.

At the July term, 1859, of the supreme court, the following Rule was adopted :

“ It shall be the duty of the plaintiff in error to cause his writ of error, with a complete transcript of the record and proceedings in the cause, to be filed with the clerk of the supreme court of the proper district, fifteen days at least before the commencement of the return term of the writ ; and if he fail to do so, and shall not show good cause for such neglect, on or before the second day of the return term, the *supersedeas*, if any, shall be set aside, or the court shall affirm the judgment ; and in all cases of such neglect, the defendant in error may continue the cause at his election.”

INDEX.

A

ACCORD.

1. Accord without satisfaction is not a good defence to an action of trespass; so where a lot of ground is wrongfully entered upon and levelled even with the grade of a street, the fact that such trespasser, after commencing the grading of the lot, agrees with the owner of the lot to curb it in return for the privilege of carrying away the earth from its surface, if such agreement remain unexecuted, will not be a bar to an action to recover damages for the trespass. *Goff v. Mulholland*, 397.

ACKNOWLEDGMENT OF DEEDS.

See CONVEYANCE.

ACTION FOR POSSESSION OF PERSONAL PROPERTY.

See CLAIM AND DELIVERY OF PERSONAL PROPERTY.

ADJOINING PROPRIETORS.

See CONVEYANCE, 17.

ADJOURNED SESSION OF A COURT.

See COSTS.

ADMINISTRATION.

1. Upon the dissolution of a partnership by the death of a partner, the surviving partner may proceed to wind up and settle the affairs of the partnership without giving bond as required by the fifth section of the first article of the act respecting executors and administrators; he may transfer a promissory note held by the partnership in payment of a partnership debt or liability. *Bredow v. Mutual Savings Institution*, 181.
2. Should the surviving partner fail, within the time limited, to give bond as required by the fifty-fifth section of the first article of the administration act, he is liable to be ousted from possession of the partnership effects, and divested of the right to administer on the same, by the executor or administrator of the deceased partner, if the latter should give bond as required by the fifty-ninth section of the first article of said act. *Id.*
3. A., a tenant for life only of certain real estate but possessed of a full power to dispose thereof by appointment by will, leased the same to B. for a term of ten years. A. died before the expiration of said term

ADMINISTRATION—(Continued.)

without having attempted to protect the tenant by exercising the power of appointment, and the tenant was evicted by the remainder man. *Held*, that B. might maintain an action against A.'s administrator to recover damages for a breach of the covenant implied from the word "lease" in the instrument of lease. *Hamilton v. Wright's Administrator*, 199.

4. An appeal will lie from an order of a probate court revoking letters of administration; the appeal will not, however, operate a suspension of the effect of the order. *Harney v. Scott*, 333.
5. The Kansas city court of common pleas, established by the act of the general assembly approved November 20, 1855, (Sess. Acts, 1855, Adj. Sess. p. 60,) does not possess probate jurisdiction. *Burke's Adm'r. v. Walrond*, 591.

ADVERSE POSSESSION.

See LIMITATION.

AGENTS.

See PRINCIPAL AND AGENT. INSURANCE.

AGREEMENT.

See DAMAGES, 1, 2, 6, 7. SECURITY FOR COSTS. CONVEYANCE. STATUTE OF FRAUDS. COVENANT.

1. An agreement to purchase an improvement on public land made before the entry of such land in the land office will, if entered into before the entry of the land, support an action; if such agreement be made after the entry of the land, it will be void for want of consideration. *Welch v. Bryan*, 30.
2. An agreement on the part of the landlord, that the tenant may take off and carry away any and all buildings, sheds and other temporary houses and improvements he may erect, would not be construed to authorize the taking away of erections, the removal of which would cause material injury to the property of the landlord. *Powell v. McAshan*, 70.
3. In a suit to recover damages for the breach of a written contract entered into with two persons, both must join as parties plaintiff. The fifth section of the second article of the practice act is inapplicable to such a case. (R. C. 1855, p. 1218.) *Ranney v. Smizer*, 366.
4. A. was appointed attorney for a bank for a term of two years. His compensation as such attorney was three per cent. upon all collections made by him in the county in which the bank was located, and five per cent. upon all collections made out of said county. During his term of office, he obtained judgment in favor of the bank upon a claim deposited in his hand for collection. *Held*, that he was entitled to his three per cent. commission on the amount recovered, whether he received the money on the judgment during his term of office or not. *State, to use, &c., v. Hawkins*, 366.
5. Certain contractors agreed with a plank road company "to do the necessary masonry, grading, gutters and all things else pertaining to the com-

AGREEMENT—(Continued)

plete graduation and masonry" of a division of the plank road. The company agreed to pay "at the rate of sixteen cents per cubic yard for all excavation of earth done on said road under this contract." Unexpectedly to both contracting parties, the contractors, in fulfilling their contract, met with a large amount of indurated earth and cemented gravel, which they excavated. *Held*—it appearing that among engineers and contractors indurated earth and cemented gravel were known and recognized as entirely distinct from common earth, and that it was customary for contractors to receive extra compensation for excavating such materials—that the price to be paid the contractors for the excavation of such materials was not provided in the contract, and that consequently they might recover what the same was reasonably worth. *Shephard v. St. Charles Western Plank Road Co.*, 373.

6. Accord without satisfaction is not a good defence to an action of trespass; so where a lot of ground is wrongfully entered upon and levelled even with the grade of a street, the fact that such trespasser, after commencing the grading of the lot, agrees with the owner of the lot to curb it in return for the privilege of carrying away the earth from its surface, if such agreement remain unexecuted, will not be a bar to an action to recover damages for the trespass. *Goff v. Mulholland*, 397.
7. Where two adjoining proprietors agree to put up a partition fence between them, each to own that portion of the fence put up by himself, and the fence built by one is mistakenly located upon the land of the other, and the latter sells his tract to a person who has no notice of the agreement as to the ownership of the fence, such purchaser will take the fence so located upon his land. *Climer v. Wallace*, 556.
8. A. conveyed to B. a slave in trust to secure and indemnify the latter against loss by reason of his being security for A. B. acting under a power in the deed of trust sold said slave to C., taking a bond to himself "as trustee of A." for a portion of the purchase money. The slave was afterwards taken from the possession of C. by the true owner from whom A. had stolen him. *Held*, that there was a failure of consideration of the bond, and payment thereof could not be enforced against C. *Long v. Gilliam*, 560.
9. A parol agreement respecting the sale of land, of which there has been part performance, is not within the statute of frauds. Possession alone, without payment, is sufficient part performance to authorize a decree for a specific execution; but the possession must be under the contract and not a mere tenancy, or taken under some other contract; and the contract must be unequivocally established. *Young v. Montgomery*, 604.

APPEAL.

See COUNTY COURTS.

1. Granting that an appeal would lie from the judgment of a county court in a proceeding instituted to obtain a removal of the seat of justice, it would only lie in the case of a final judgment. *Wood v. Phelps County Court*, 119.
2. Neither under the general act regulating the removal of seats of justice

APPEAL—(Continued.)

(R. C. 1855, p. 513), nor under the act organizing Phelps county (Sess. Acts, 1857, Adj. Sess. p. 397) would an appeal lie to the circuit court from an order of the county court sustaining or overruling a motion to set aside or vacate a former order of the county court approving the location of the seat of justice. *Id.*

3. An appeal will lie from an order of a probate court revoking letters of administration; the appeal will not, however, operate a suspension of the effect of the order. *Harney v. Scott*, 333.

ARBITRATION.

1. An award, to be capable of enforcement according to the provisions of the act concerning arbitrations, must be in writing and made upon a written submission; a parol submission and award will, however, be valid and binding if the subject matter of the controversy is such that a parol agreement in respect to it would be valid, and the award made is of such a character that the party in whose favor it is made has a remedy to compel its performance; in such case the award may be pleaded in bar of a suit on the original cause of action. *Hamlin v. Duke*, 166.

ASSIGNMENTS.

See CONVEYANCE. FRAUD AND FRAUDULENT CONVEYANCES. PATENT RIGHT.

ATTACHMENT.

1. Where, in St. Louis county, a levy of an execution or attachment is made upon personal property, a person other than the defendant in such execution or attachment, claiming the property so levied on, has a choice of remedies. He may make claim to the property in accordance with the third section of the local act of March 3, 1855, (Sess. Acts, 1855, p. 464); in which case, if the sheriff or other officer demands and receives a *sufficient* indemnification bond from the plaintiff in the execution or attachment, the claimant will have no remedy against the officer but must resort to a suit on the indemnification bond. Should the claimant, however, not make claim in the manner provided in said section, he may maintain an action against the sheriff or other officer for the possession of the property levied on. *Bradley v. Holloway*, 150.
2. A sheriff or other officer levying an execution or attachment is not authorized, under said act of March 3, 1855, to demand an indemnification bond of the plaintiff in the execution or attachment unless claim is made to the property levied on substantially as provided in the third section of said act. *Id.*
3. The constructive fraud against creditors, which exists where it is understood between the grantor in a deed of trust conveying a stock of goods and the *cestui que trust* that the former is to remain in possession and continue to sell in the ordinary course of business, is sufficient to support an attachment under the seventh clause of the first section of the attachment act. *Reed v. Pelletier*, 173.

ATTACHMENT—(Continued.)

4. Foreign incorporated insurance companies, which have established agencies within this state, and whose agents have complied with the provisions of the act licensing and regulating agencies of foreign insurance companies (R. C. 1855, p. 884), are subject to garnishment process. *McAllister v. Pennsylvania Insurance Co.*, 214; *Same v. Commonwealth Insurance Co.*, 214.
5. Service of garnishment process may be had in such case upon the authorized agent of the foreign insurance company, he being a chief or managing officer thereof within the meaning of the twenty-sixth section of the first article of the attachment act. *Id.*
6. A. delivered to B. 300 barrels of cement on storage. B. gave to A. a receipt acknowledging the delivery of said cement on storage for C. and stating that it was to be delivered upon return of said receipt endorsed by C. This receipt A. delivered to C., and C. gave to A. an instrument in writing stating that he received and held it as security for the payment of a promissory note drawn in his favor by A. He also thereby engaged to deliver said receipt up to A. or his order upon payment of said note. D. instituted a suit by attachment against A. and summoned C. as garnishee. Afterwards C. instituted a suit against B. to recover the value of the cement which B. had refused to deliver to C. on the presentation of the above receipt. After the institution of this suit against B. but before C. had filed his answer to the interrogatories in the attachment suit, A. paid to C. the promissory note for which the warehouse receipt above mentioned was held as a security, and A. gave to B. the instrument in writing above mentioned signed by C., with an order endorsed thereon by A. for the delivery to B. of the receipt given by B. C. answered the interrogatories in the attachment suit, setting forth the facts above stated, the institution of the suit against B., and the payment of the promissory note by A. He further stated in his answer that whatever judgment he should obtain against B. would be the amount in his hands belonging to A. Judgment was rendered in the attachment suit against C., the garnishee. *Held*, that, as C. held the cement merely by way of security, and the debt for which it was so held had been paid, C. was not entitled to recover in the suit against B. more than the costs of suit. *Miller v. Mitchell*, 304.
7. Should the objection be taken, at the trial of an issue raised by an interplea in an attachment, that the interpleader only claims the attached property as *cestui que trust*, he should be permitted to substitute his trustee as plaintiff in the interplea. *Winkelmeier v. Weaver*, 358.
8. If the plaintiff in an attachment suit file an insufficient bond, he has the right to file another. *Wood v. Squires*, 528.
9. In an attachment suit commenced in the names of the members of the firm of "Wood, Bacon & Co.," the attachment bond purported to be the bond of "Wood, Bacon & Co." as principals and "Northup & Co." as securities, and was signed thus—"Wood, Bacon & Co. [seal], by their attorney, P. S. Brown [seal]; Northup & Co., by H. M. Northup [seal]"—*held*, that the attachment bond was not a nullity and should not be treated as such. *Id.*

ATTACHMENT—(Continued.)

10. Where an attachment is based upon two grounds, and the plaintiff establishes one of them, it can not avail the defendant any thing to show that the other ground of attachment has no basis. *Tucker v. Frederick*, 574.
11. Declarations of the defendant in the attachment made after the attachment are inadmissible in his favor to explain away the effect of previous declarations. *Id.*
12. In a suit upon a promissory note, if the defendant be personally served with process, he must answer the petition on or before the second day of the term at which he is bound to appear. (R. C. 1855, p. 1235, § 24.) This rule applies where an attachment is sued out in aid of such suit, in case there has been service of the writ of attachment in time for judgment at such term. *Farrington v. McDonald*, 581.

ATTORNEY AT LAW.

1. A. was appointed attorney for a bank for a term of two years. His compensation as such attorney was three per cent. upon all collections made by him in the county in which the bank was located, and five per cent. upon all collections made out of said county. During his term of office, he obtained judgment in favor of the bank upon a claim deposited in his hand for collection. *Held*, that he was entitled to his three per cent. commission on the amount recovered, whether he received the money on the judgment during his term of office or not. *State, to use, &c., v. Hawkins*, 366.
2. An attorney of record in a cause is authorized to receive payment or a judgment recovered therein. Those dealing with such an attorney will not be affected by any arrangements entered into by him with his client, or by a revocation of his authority of which they have no notice. *Id.*

AUCTIONS.

See BOONVILLE.

AWARD.

See ARBITRATION.

B

BAIL.

See RECOGNIZANCE.

BAILMENT.

See COMMON CARRIER.

1. Where property is bailed to a partnership, one partner can not absolve himself from liability to a bailor, without the latter's consent, by retiring from the firm. Where, however, property is not bailed for any definite time, but the bailor may take the same away at any time, a retiring partner may give notice to the bailor of his retiring and may require him to take away the bailed property; if the bailor should then permit it to remain after the expiration of a reasonable time, he must

BAILMENT—(Continued.)

- look to the remaining partners; the retiring partner would be absolved from liability for loss occurring after his retirement. *Winston v. Taylor*, 82.
2. A slave was placed in a private jail-yard for safe keeping. The bailor at the time knew, through occasional visits to the yard, that a negro boy watched at the door of the enclosure and opened the same for purposes of ingress and egress. Held, that this fact would not, in an action to recover damages for the escape of the slave through negligence on the part of the jailor, prevent the bailor from complaining of the trust reposed in the negro boy as an act of negligence. *Russell v. Lynch*, 312.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See CONFLICT OF LAWS. BOATS AND VESSELS, 4.

1. It will be presumed that the drawer of a bill of exchange has a right to draw on the drawee thereof until the contrary be shown; if the payee or holder seeks to recover of the drawer in a case where no presentment has been made, it will devolve on him to show that the drawer had no funds in the hands of the drawee and no right to draw on him; it will not be sufficient to show that the drawer withdrew his funds after the maturity of the bill. *Adams v. Darby & Barksdale*, 162.
2. Whenever it is incumbent upon the holder of a bill to make presentment thereof, and he neglects to do so, he will lose not only his remedy upon the bill, but also upon the consideration or debt in respect of which it was given or transferred. *Id.*
3. A promissory note may be transferred by delivery for a valuable consideration without endorsement or written assignment so as to enable the assignee to maintain an action thereon in his own name. *Boeka v. Nuella*, 180.
4. In an action in the nature of an action of trover for the conversion of a promissory note, the measure of damages, *prima facie*, is the amount called for on the face of the note. *Bredow v. Mutual Savings Institution*, 181.
5. The third section of the act of 1855 concerning bonds, notes and accounts (R. C. 1855, p. 322), allowing the obligor or maker of a non-negotiable promissory note every just set-off against the assignor existing at the time of the assignment unless it is expressed in the note that it is "for value received, negotiable and payable without defalcation," is not applicable to notes executed before the revised code of 1855 went into effect and made payable "without defalcation or discount," although assigned after said code went into effect. *Paston v. Bussmeyer*, 330.
6. Where the endorser of a negotiable promissory note resides within the town or city where protest thereof is made, notice of protest must be served upon him personally, or it must be left at his place of abode or of business; if, however, his residence is outside the city limits, though near the same, and though his address is the city post-office, it is sufficient if notice of protest be deposited, directed to him, in the city post-office. *Barret v. Evans*, 331.

BILLS OF EXCHANGE AND PROMISSORY NOTES—(*Continued.*)

7. The notary who presents and protests a bill of exchange for nonpayment is authorized to give notice to the various parties to the bill. *Renick & Peterson v. Robbins*, 339.
8. No particular form of notice is required; it is sufficient if the words employed, either in express terms or by necessary implication, give identity to the bill and information that it has not been accepted or paid upon due presentment. *Id.*
9. Upon the protest for *non acceptance* of a sight bill of exchange entitled to days of grace and the giving of notices to the drawer and endorsers, their liability to the holder is immediately fixed; it is not necessary that the bill should be presented for payment on the last day of grace. *Lucas v. Ladew*, 342.
10. Although days of grace upon sight bills have been abolished by statute in this state, it will be presumed, in the absence of proof of change by legislative enactments, that the common law, allowing days of grace upon such bills, is the law of a sister state or a territory of the United States. *Id.*
11. Where the obligation to pay a promissory note is made dependent upon the performance by the payee thereof of a condition contained in a collateral agreement entered into between the payee and the maker, and the maker of the note waives the performance of the condition, his obligation becomes fixed and complete. *West v. Best*, 551.
12. Where a mature negotiable promissory note is delivered by the payee without endorsement to an agent for collection, the possession of the note by the latter will not raise a presumption that he has authority to assign the same; the burden of proving an assignment by authority of the payee rests upon the party claiming under such alleged assignment. *Hardesty v. Newby*, 567.
13. A person to whom a negotiable promissory note has been endorsed may maintain an action thereon in his own name, although it was endorsed to him merely for collection. In a suit on such a note by an endorsee the caption of the petition was as follows: "A., to the use of B., plaintiff, v. C., defendant." In the body of the petition the plaintiff alleged title in himself by endorsement from B. *Held*, that the words in the caption "to the use of B." might be regarded as mere surplusage. *Beattie v. Lett*, 596.
14. A., the payee of a non-negotiable promissory note, endorsed the same in blank and delivered the same to B. in satisfaction of a debt due B. *Held*, that B. might recover in an action in his own name against the maker without having an assignment written above the endorsement. *Bennett v. Pound*, 598.
15. An action can be maintained in the name of a holder of a non-negotiable promissory note transferred merely by delivery. *Id.*

BILL OF LADING.

See COMMON CARRIER.

BILL OF PEACE.

See EQUITY, 5.

BOATS AND VESSELS.

See COMMON CARRIER.

1. As a general rule the master of a steamboat navigating the rivers of the west has authority to hire pilots and other subordinate officers for the whole of a boating season; such contracts, in the absence of any limitation upon the master's general authority by custom or otherwise, would be binding upon the owner. *Hight v. Robbins*, 168.
2. A. was employed as a fireman on a steamboat for a trip from St. Louis to New Orleans and back at certain agreed wages per month; after the steamboat had proceeded a short way on her trip to New Orleans, A. was discharged and put ashore without cause; the trip lasted twenty-seven days, during which A. obtained employment elsewhere for about eight or nine days. *Held*, that A.'s claim to relief might be enforced by suit against the boat to recover wages for the trip; that this claim was a lien on the boat and might be enforced as such in an action under the act concerning boats and vessels; that A. might recover wages up to the completion of the trip, deducting any wages he may in the mean time have earned on any other boat. *Grant v. Steamboat Maria Denning*, 280.
3. Where a hand, employed on a steamboat for a trip at certain agreed wages per month, is, without cause, discharged before the termination of the trip, he may recover compensation at the agreed wages for a trip of the usual length; if the trip should be extended by accident beyond the usual period, he could not recover full wages for the whole time including the accidental detention. *Cunningham v. Steamboat Low-water*, 338.
4. The master of a steamboat has no authority, as master, to bind the boat or its owners by a promissory note. *Gregg v. Robbins*, 347.
5. The master or clerk of a boat can not enforce a claim for wages due for services rendered on board thereof by a proceeding *in rem* under the boat and vessel act. (R. C. 1855, p. 303.) *Lancaster v. Woodboat Hardin*, 351.
6. This rule applies to the "foreman" of a woodboat acting in the capacity of master. *Id.*

BOND.

See AGREEMENT. SHERIFF.

BOONVILLE.

1. The mayor and board of councilmen of the city of Boonville have power, under the charter of said city, by ordinance to provide for "licensing, taxing and regulating auctions;" they may prohibit persons from exercising the business of auctioneers without license by such fines and penalties as they may think proper, although the same should exceed ninety dollars. *Wilks v. City of Boonville*, 543.
2. The mayor of the city of Boonville has jurisdiction over all cases arising under the charter and the ordinances of said city, although they should involve the assessment of a fine or penalty exceeding ninety dollars. *Id.*

BRIDGES.

See MECHANICS' LIENS.

BURDEN OF PROOF.

See EVIDENCE.

C

CALDWELL COUNTY.

See COUNTY COURTS.

CARE.

See COMMON CARRIER. BAILMENT.

1. A slave was placed in a private jail-yard for safe keeping. The bailor at the time knew, through occasional visits to the yard, that a negro boy watched at the door of the enclosure and opened the same for purposes of ingress and egress. *Held*, that this fact would not, in an action to recover damages for the escape of the slave through negligence on the part of the jailor, prevent the bailor from complaining of the trust reposed in the negro boy as an act of negligence. *Russell v. Lynch*, 312.

CARONDELET.

1. Under the act of incorporation of March 1, 1851, (Sess. Acts, 1851, p. 139,) the city of Carondelet had power to sell and dispose of its school lands; the purchaser was under no obligation to see to the application of the purchase money. She might convey a portion of her school lands in exchange for and by way of compromise of an adverse claim to land embraced within her survey of common. Third persons could not dispute the validity of such an exchange on the ground that Carondelet had thereby committed a breach of its obligation to appropriate the school lands and their proceeds to the use of schools. *Bowlin v. Furman*, 427.
2. A conveyance by Carondelet by quit-claim deed of a portion of its school lands is valid and operative although at the date thereof there was no survey or assignment by the United States for the use of schools; to sustain a conveyance made before such assignment it is not necessary to invoke the doctrine of the enurement of after-acquired titles. *Id.*

CHANCERY PRACTICE.

See PRACTICE, 34.

CHANGE OF VENUE.

See CRIMES AND PUNISHMENTS, 6.

CHARTER.

See BOONVILLE. CARONDELET. CORPORATION. RAILROADS.

CITY OF ST. LOUIS.

1. The inspector of the fire department of the city of St. Louis had power, under the thirteenth section of the ordinance establishing and regu-

CITY OF ST. LOUIS—(Continued.)

lating the fire department, approved April 5, 1856, (Rev. Ord. 434,) to order and contract for repairs of engine houses, where the repairs ordered amounted to more than fifty dollars; a contract for repairs made by him as inspector, though not made in the name of the city of St. Louis, would be binding upon her. *Robinson v. City of St. Louis*, 488.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

See ATTACHMENT. EXECUTION. SHERIFF.

1. To maintain an action for the possession of specific personal property, the plaintiff must be the owner, or be entitled to the possession, of the specific property claimed. *Pilkington v. Trigg*, 95.
2. A. purchased certain property of B. and gave to the latter in payment therefor drafts on St. Louis; these drafts B. delivered to C., a banker, for collection; C. received payment of the same and placed the amount collected to the credit of B. *Held*, that A. could not, in an action for the recovery of specific personal property, recover the amount so collected by C. on the ground that he had been induced to make said purchase by fraudulent representations on the part of B.; nor could such an action be maintained, although C. should, after its commencement, separate from the general mass of moneys in his possession the amount so collected for B. and should place the same in a bag marked "A. or B." *Id.*
3. The St. Louis law commissioner's court has jurisdiction of an action for the possession of specific personal property in which the value of the property claimed is alleged to be one hundred and fifty dollars and the damages claimed for the detention are fifty dollars; it is the value of the property claimed that determines the jurisdiction. *Annis v. Bigney*, 247.
4. Where, in an action for the possession of personal property, the plaintiff gives bond and receives possession of the property, and the cause is tried by a jury, the jury, regularly, in case of finding for the defendant, should assess the value of the property, as also the damages. *Hohenthal v. Watson*, 360.
5. Where a sheriff in St. Louis county levies an execution upon personal property, a third person claiming the same may maintain an action against the sheriff for its possession without making claim thereto in accordance with the third section of the local act of March 3, 1855. (Sess. Acts, 1855, p. 464.) *St. Louis, Alton & Chicago Railroad Co. v. Castello*, 379.
6. A sheriff, under an execution against A., levied upon a lot of gold and silver and copper coins and paper currency belonging to B.; B., with a view to facilitate the institution of a suit by himself to test his title, substituted, in the hands of the sheriff, for the property levied on, bank bills of large denomination, the exchange being made by him and the sheriff under the understanding that suit would be brought by B. for the possession of the bank bills thus substituted. *Held*, that B. might, under such circumstances, maintain an action against the sheriff for the possession of the bank bills. *Id.*

CLAIM AND DELIVERY OF PERSONAL PROPERTY—(Continued.)

7. Where, in St. Louis county, a levy of an execution or attachment is made upon personal property, a person other than the defendant in such execution or attachment, claiming the property so levied on, has a choice of remedies. He may make claim to the property in accordance with the third section of the local act of March 3, 1855, (Sess. Acts, 1855, p. 464); in which case, if the sheriff or other officer demands and receives a *sufficient* indemnification bond from the plaintiff in the execution or attachment, the claimant will have no remedy against the officer but must resort to a suit on the indemnification bond. Should the claimant, however, not make claim in the manner provided in said section, he may maintain an action against the sheriff or other officer for the possession of the property levied on. *Bradley v. Hollo-way*, 150.

CLERKS.

See COUNTY COURTS. COSTS. FEES.

COMMISSIONERS.

1. Where a public act requiring the exercise of judgment is to be performed by several commissioners appointed in a statute, all of them must meet and confer. *Wood v. Phelps County Court*, 119.
2. Though a majority of the commissioners appointed by the act organizing Phelps county (Sess. Acts, 1857, Adj. Sess. p. 397) may make a location of a seat of justice, yet all the commissioners appointed must meet and confer with respect to such location. *Id.*

COMMON CARRIER.

1. In an action against a carrier to recover damages for his failure to transport goods to their place of destination, if the owner seeks to recover the value of the goods at the place of destination, the freight that would have been earned by the carrier in transporting the goods to their place of destination must be taken into estimation and allowed the carrier. *Atkison v. Steamboat Castle Garden*, 124.
2. If a carrier deliver goods at their place of destination after the appointed time, the acceptance of them by the owner will not discharge the carrier from liability for the breach of his contract; so the acceptance of goods from a carrier at a place short of their place of destination will not absolve him from liability for a breach of his contract committed before delivery; in such cases, the carrier is exempt from damages only where there has been no breach of the contract previous to the delivery of the goods. *Id.*
3. If a consignee refuse to receive the goods consigned to him, it is the duty of the carrier to take such steps in relation to the goods as will advance the owner's interest and purposes consistently with a reasonable security to himself for his freight and charges; what he ought to do in a given case will depend upon circumstances; if, acting as agent for the owners, he pursues such course as men of ordinary prudence would follow, he will be protected by the law whatever may be the result. *Steamboat Keystone v. Moies*, 243.

COMMON CARRIER—(*Continued.*)

4. A custom among steamboat carriers to return goods to the shipper if the consignee should refuse to receive them, and to charge freight upon the return trip as well as upon the out-going trip, would seem to be unreasonable if applied to all kinds and qualities of goods shipped. *Id.*
5. A common carrier is an insurer of goods entrusted to him for transportation; if loss or damage occur, he is liable unless he shows affirmatively that it happened by reason of some one of the excepted perils. The onus being upon the carrier, he will not be discharged from liability by showing that the navigation was difficult or dangerous, or that he employed skillful or competent persons to control and manage the boat; he must show that the loss occurred in a manner and for a cause that will acquit him. *Hill v. Sturgeon & Rawlings*, 323.
6. The words "dangers of the river, &c.," in a bill of lading, mean only the natural accidents incident to river navigation, and do not embrace such as may be avoided by the exercise of the skill, judgment and foresight demanded of the carrier. *Id.*
7. If at the time of a disaster and consequent damage or loss of goods in charge of a carrier, he is guilty of some delinquency—as by having an incompetent pilot in charge of the boat—if such delinquency *might* have contributed to the disaster or *might* have had an agency in producing it, he will be liable; he may, however, show by way of defence that the disaster *must* have occurred although the delinquency had never existed. *Id.*
8. A pilot, who is acquainted with the place of a disaster and with the character for skill of the pilot or steersman in charge of the boat at the time of the disaster, may testify as to whether it was prudent to allow the latter to pilot the boat at the time of the accident. *Id.*
9. A clause in a bill of lading given in behalf of a steamboat for goods shipped on a barge, to the effect that the steamboat and owners "insure the freight shipped on the barge against leaking and sinking," is intended to insure only the seaworthiness of the barge. *Id.*

CONDITIONS.

See RAILROADS. BILLS OF EXCHANGE AND PROMISSORY NOTES.

CONFESSIONS.

See EVIDENCE. CRIMES AND PUNISHMENTS.

CONFESSION OF JUDGMENT.

See JUDGMENT BY CONFESSION.

CONFLICT OF LAWS.

See JUDGMENTS OF SISTER STATES. WILLS AND TESTAMENTS, 4, 5.

1. A. and B. gave to C. their joint promissory note dated and payable at the city of New York. By the law of the state of New York at the date of the note, upon the recovery of a judgment against one of two joint debtors there was a merger of the debt and no action could afterwards be maintained against the other joint debtors. C. instituted suit upon said promissory note in the state of Louisiana against A. alone, and recovered judgment. *Held*, that this judgment against A. was no

CONFLICT OF LAWS—(Continued.)

- bar to an action on the note against B. alone in the courts of this state. *Wiley v. Holmes*, 283.
2. Although days of grace upon sight bills of exchange have been abolished by statute in this state, it will be presumed, in the absence of proof of change by legislative enactments, that the common law, allowing days of grace upon such bills, is the law of a sister state or a territory of the United States. *Lucas v. Ladew*, 342.
 3. A judgment obtained in a sister state upon notice to the defendant by publication only, there being no appearance of the defendant, will be deemed null and void outside the state in which it is rendered. *Winston v. Taylor*, 82.

CONSIDERATION.

See AGREEMENT. VENDORS AND PURCHASERS.

CONSIGNEE.

See COMMON CARRIER.

CONSTABLE.

See SHERIFF. EXECUTION.

CONSTITUTIONAL LAW.

See SEATS OF JUSTICES. GROCERS' LICENSE. RAILROAD.

1. The legislature of the former territory of Missouri had no power by legislative act to grant divorces. (Per NAPTON, Judge; SCOTT, Judge, not concurring, holding that the territorial legislature had such power.) *Chouteau v. Magenis*, 187.
2. The act of the general assembly of January 21, 1857, (Sess. Acts, 1857, p. 746,) directing the county court of Caldwell county to audit and allow one W. F. Boggs, for services rendered in making an index of deeds and mortgages of record in said county at the rate of ten cents for each name, and to draw their warrant in favor of said Boggs for the sum thus ascertained to be due, and declaring that it shall be the duty of the county treasurer to pay said warrant out of any money appropriated for county expenditures, is unconstitutional and void. *Boggs v. Caldwell County*, 586.
3. The act regulating dram-shops, approved December 13, 1855, (R. C. 1855, p. 683) and the act to tax and license merchants, approved December 11, 1855 (R. C. 1855, p. 1077, § 22,) did not affect the validity of an unexpired grocer's license granted previous to May 1, 1856. *State v. Andrews*, 14.

CONSTRUCTION.

See AGREEMENT. CONVEYANCE. COMMON CARRIER. COVENANT. DAMAGES.

CONTINUANCE.

1. Where an application is made for a continuance on the ground of the absence of a material witness, it must appear from the accompanying affidavit that the applicant had used due diligence to procure the testimony of such absentee. *Cline & Jamison v. Brainard*, 341.

CONTRIBUTION.

See WILLS AND TESTAMENTS, 6.

CONVEYANCE.

See COVENANT. VENDORS AND PURCHASERS.

1. A. and B. made an exchange of lands, each party agreeing to pay one-third of all taxes for the year assessed upon the land sold by him to the other, and two-thirds of the taxes assessed upon the land bought by him from the other. A. paid to B. the proportional share of the taxes agreed upon. B. did the same. Among the taxes assessed against the land sold by A. to B. was a railroad tax. This tax A. was by law exempted from paying by reason of his being a stockholder of a railroad company. He did not actually pay said tax, but, in his account with the collector, he was credited with the amount of the railroad tax by reason of his having previously paid his subscription of stock to an equal amount. At the time B. made his payment to A. of the agreed proportional share of the taxes, he did not know that A. was a stockholder and therefore exempt from paying the railroad tax, and that he had not actually paid it. *Held*, that B. was not entitled to recover back the two-thirds of the railroad tax paid by him to A. *Labarge v. Renshaw*, 363.
2. A call in a deed for a boundary certainly ascertained will prevail over a call for distance. *Whittelsey v. Kellogg*, 404.
3. The construction of deeds is a matter for the court and not for the jury; though it is the province of the jury to determine *where* the boundaries called for in a deed are located, it is the province and duty of the court to declare *what* the boundaries are that control the location. *Id.*
4. Although a witness, a surveyor, should be improperly permitted to give his opinion upon a matter of law, as to declare what are the controlling calls of a deed, a judgment will not be reversed for this impropriety, if the opinion given be substantially correct and such as can not have prejudiced the party complaining of it. *Id.*
5. *Quere*, how far is a deed of trust conveying a stock of goods in trade and also all goods and stock that may belong to the grantor during the continuance of the trust valid and operative? *Hall v. Webb*, 408.
6. The proviso of the act of June 22, 1821, (1 Terr. Laws, 756,) to the effect that nothing therein contained should "in anywise authorize husband and wife to convey [any] estate granted to the wife and heirs after intermarriage" does not apply to a confirmation, by the act of Congress of June 13, 1812, of a Spanish concession or claim cast upon the wife by descent previous to her marriage; nor does said proviso apply to the case of an inheritance by a wife during marriage of such a confirmation; husband and wife might, under said act of June 22, 1821, convey land thus confirmed to the wife during marriage, or thus falling to her by inheritance. *Garnier v. Barry*, 438.
7. The second section of the act of December 6, 1821, (1 Terr. Laws, 798,) was applicable to a conveyance by husband and wife of the latter's real estate under the act of June 22, 1821; consequently, such a

CONVEYANCE—(Continued.)

conveyance was not entitled to be admitted to record unless the certificate of acknowledgment contained the requisites prescribed by the said second section of the act of December 6, 1821. It was necessary that the certificate should state that the persons making the acknowledgment were personally known to the person taking the same, or were proved by two credible witnesses, whose names were mentioned therein, to be the proper persons who made and executed the deed. *Id.*

8. The fifty-eighth section of the act concerning evidence (R. C. 1855, p. 733) is not, it seems, applicable to the case of the record of a deed of a married woman defectively acknowledged; a certified copy of the record of such a deed and of the time of its record, though accompanied with proof of claim and enjoyment under such deed for ten consecutive years, would not, under said section, be *prima facie* evidence of its execution and genuineness. *Id.*
9. A. and B., husband and wife, on the 10th of December, 1823, executed a conveyance of land belonging to the wife. The acknowledgment was taken on the same day before a county court, which was composed of at least three judges, and certificate thereof was in the following form: "Be it remembered, that on, &c., appeared in open court A. and B., his wife, and acknowledged the foregoing deed of conveyance from them to L. A. B. to be their voluntary act and deed for the purposes therein expressed; she, the said B., being privily and apart from her said husband examined, declared that she did freely and willingly seal and deliver the said writing and wished not to retract, and she being previously made acquainted with the contents thereof." This acknowledgment was attested by the presiding justice under the seal of the court. *Held*, that this acknowledgment was sufficient to pass the title of the wife under the act of June 22, 1821; (1 Terr. Laws, p. 756;) the certificate of acknowledgment was not, however, sufficiently in conformity to the second section of the act of December 6, 1821, (*id.* p. 798,) to authorize its admission to record. *Id.*
10. The act of February 14, 1825, (R. C. 1825, p. 220, § 12,) regulating conveyances, required a married woman, making an acknowledgment of a deed of conveyance of her estate, to "appear before some court of record." In a certificate of acknowledgment taken before a judge of a probate court, and certified by him, he having no clerk, it was stated as follows: "At a term of the probate court for, &c., before me, M. P. L., judge of said court, personally appeared M. G., wife, &c., who is personally known," &c. *Held*, that the acknowledgment was good. *Id.*
11. The intention of the parties to a deed, as shown by the entire deed, should govern in its construction; where certain of the words used appear repugnant to the other portions of the deed and to the general intention of the parties, they should be rejected. *Gibson v. Bogy*, 478.
12. A call for a monument in a deed, as for a "public road," will be controlled by the other calls therein, if it be apparent that it was inadvertently inserted. *Id.*
13. To render an assignment of a patent right or of an undivided part

CONVEYANCE—(*Continued.*)

- thereof valid, it is not necessary that it should be recorded in the United States patent office; the assignee will have a vendible interest without such record. *Sone v. Palmer*, 539.
14. Where A. conveys land to B. and B. gives his notes for the purchase money, and, there being doubts as to A.'s title, both parties enter into an agreement that unless A. within a reasonable time make good title to the land, the notes should become void and B. should restore the land to A., and A. sues B. on the promissory notes; *held*, that the question whether A. had made good the title to the land within the meaning of the agreement is a question of law for the court. *West v. Best*, 551.
 15. A justice of the peace can not take the acknowledgment of a married woman of a deed conveying her real estate; the acknowledgment must be taken by some court having a seal, or some judge, justice or clerk thereof. *Id.*
 16. A worm fence is a part of the freehold and passes along with the land upon which it is built. *Climer v. Wallace*, 556.
 17. Where two adjoining proprietors agree to put up a partition fence between them, each to own that portion of the fence put up by himself, and the fence built by one is mistakenly located upon the land of the other, and the latter sells his tract to a person who has no notice of the agreement as to the ownership of the fence, such purchaser will take the fence so located upon his land. *Climer v. Wallace*, 556.
 18. The corners established by the United States surveyors in surveying the public lands are conclusive as to the actual location of the boundary lines of sections and such subdivisions thereof as are authorized by the laws of the United States; it can not be shown that the United States surveyors mistakenly located such corners. *Id.*

CORPORATIONS.

See CARONDELET. BOONVILLE. RAILROADS. JURISDICTION. CITY OF ST. LOUIS.

1. In a suit against a corporation, a stockholder thereof is a competent witness in behalf of the corporation. (*Barclay v. Globe Mutual Insurance Co.* 26 Mo. 490, affirmed.) *Bredow v. Mutual Savings Institution*, 181.
2. Foreign incorporated insurance companies, which have established agencies within this state, and whose agents have complied with the provisions of the act licensing and regulating agencies of foreign insurance companies (R. C. 1855, p. 884), are subject to garnishment process. *McAllister v. Pennsylvania Insurance Co.*, 214; *Same v. Commonwealth Insurance Co.*, 214.
3. Service of garnishment process may be had in such case upon the authorized agent of the foreign insurance company, he being a chief or managing officer thereof within the meaning of the twenty-sixth section of the first article of the attachment act. *Id.*
4. Where an instrument purporting to be the act of a corporation has the common seal of the corporation attached, and the signatures of the proper officers are proved, it will be presumed that such officers had au-

CORPORATIONS—(Continued.)

- thority from the corporation to execute the same. *St. Louis Public Schools v. Risley*, 415.
5. The secretary of the board of directors of the St. Louis Public Schools is a proper person to whom to deliver applications for renewal of leases made by said board with covenants of renewal. The declarations of a deceased secretary, made when applied to in behalf of an applicant for renewal before the expiration of the time within which demand of renewal should be made, are admissible in evidence to show that the application for renewal had been received by him as secretary in due time. *Blackmore v. Boardman*, 420.
 6. Where a deed, purporting to be the deed of a corporation, is admitted, and no objection is made to its introduction on the ground that the corporate seal has not been proved, this objection will not be entertained in the supreme court. *Chouquette v. Barada*, 491.
 7. Where an instrument purporting to be the act of a corporation has the common seal of the corporation attached, and has been signed by the proper officer it will be presumed that it was executed by authority of the corporation. *Id.*
 8. Justices of the peace have jurisdiction of actions brought against railroad corporations under the twelfth section of the general railroad act. (R. C. 1855, p. 414.) *Mooney v. Hannibal & St. Joseph Railroad Co.*, 570.

COSTS.

See FEES. SECURITY FOR COSTS.

1. A special adjourned session of a court, although it may with propriety be said to be a continuance of the regular term, since its object is the completion of the business of the regular term, is a separate and distinct term of the court. Should such a special adjourned term be appointed and a cause be continued thereat at the cost of the party applying for such continuance, this order, properly construed, would embrace the costs of such adjourned term only and not those of the previous regular term. *Dulle v. Deimler*, 583.
2. Should the clerk in such case, in issuing execution for costs, include the costs of the regular term, the court may at a subsequent term order a retaxation of the costs. *Id.*
3. Where a suit results adversely to the plaintiff and he becomes liable for costs and judgment is rendered accordingly, it is no error as against him that judgment for costs is also rendered against another irregularly made a party to the suit at the instance of the defendant. *Dickerson v. Chrisman*, 134.

COUNTY COURTS.

See ROADS AND HIGHWAYS, 1, 2. SEATS OF JUSTICE.

1. A justice of a county court is not authorized to let to bail a person indicted for a bailable offence unless the indictment is pending in his county. *State v. Nelson*, 13.
2. A county court has the power to order an index to be made to the books in which deeds are recorded and to allow a reasonable compensation therefor out of the county funds. *Boggs v. Caldwell County*, 586.

COUNTY COURTS—(*Continued.*)

3. In order that such an order may be valid and binding upon the county, it is not, it seems, necessary that it should be entered of record. A verbal direction from the justices on the bench or from the presiding justice would be sufficient. *Id.*
4. At the May term, 1857, of the Caldwell county court an account was presented for allowance against the county. The account was disallowed. At the March term, 1858, by leave of court, testimony touching the same account was introduced. The court having heard the testimony, "adhered to its former decision." An appeal was then taken to the circuit court. *Held*, that the appeal was well taken; that the rejection of the claim at the May term, 1857, was not like a judgment in a suit between individuals which the court could not open at a subsequent term; that the county court could waive an advantage the county might have. *Id.*
5. The act of the general assembly of January 21, 1857, (Sess. Acts, 1857, p. 746,) directing the county court of Caldwell county to audit and allow one W. F. Boggs, for services rendered in making an index of deeds and mortgages of record in said county at the rate of ten cents for each name, and to draw their warrant in favor of said Boggs for the sum thus ascertained to be due, and declaring that it shall be the duty of the county treasurer to pay said warrant out of any money appropriated for county expenditures, is unconstitutional and void. *Id.*

COURT.

1. A special adjourned session of a court, although it may with propriety be said to be a continuance of the regular term, since its object is the completion of the business of the regular term, is a separate and distinct term of the court. Should such a special adjourned term be appointed and a cause be continued thereat at the cost of the party applying for such continuance, this order, properly construed, would embrace the costs of such adjourned term only and not those of the previous regular term. *Dulle v. Deimler*, 583.
2. Should the clerk in such case, in issuing execution for costs, include the costs of the regular term, the court may at a subsequent term order a re-taxation of the costs. *Id.*

COVENANT.

1. The word "lease" as an operative word in an instrument of lease imports and contains a covenant for quiet enjoyment as well as the words "grant and demise." (Scott, J., dissenting.) *Hamilton v. Wright's Adm'r*, 199.
2. Such implied covenant runs with the land. *Id.*
3. A., a tenant for life only of certain real estate but possessed of a full power to dispose thereof by appointment by will, leased the same to B. for a term of ten years. A. died before the expiration of said term without having attempted to protect the tenant by exercising the power of appointment, and the tenant was evicted by the remainder man. *Held*, that B. might maintain an action against A.'s administra-

COVENANT—(*Continued.*)

tor to recover damages for a breach of the covenant implied from the word "lease" in the instrument of lease. *Id.*

4. A covenant for perpetual renewal of a lease is valid. *Blackmore v. Boardman.*
5. A covenant for renewal of a lease is an incident to the lease and will pass by an assignment of the unexpired term; a sale by the sheriff under an execution of the interest of the lessee in the land will pass to the purchaser the covenant for renewal. *Id.*

CRIMES AND PUNISHMENTS.

See GROCER'S LICENSE.

1. A justice of a county court is not authorized to let to bail a person indicted for a bailable offence unless the indictment is pending in his county. *State v. Nelson*, 13.
2. An indictment, founded on section 8 of the eighth article of the act concerning crimes and punishments (R. C. 1855, p. 624), charging the defendant with an open and notorious act of public indecency, grossly scandalous by "exhibiting and exposing his private parts in presence of a male and female, at," &c., is sufficient. *State v. Gardner*, 90.
3. To render a voluntary confession, made by an accused person before a committing magistrate and reduced to writing by the latter, admissible in evidence on the trial, it is not necessary that the record of the proceedings of the magistrate should show specifically that the prisoner was distinctly informed of the charge made against him and that he was at liberty to refuse to answer any question put to him, and that a reasonable time was allowed the prisoner to advise with his counsel and for that purpose to send for counsel; it is sufficient if it be shown upon the trial, by the testimony of the committing magistrate, that, the requirements of the statute in this regard had been complied with. *State v. Lamb*, 218.
4. A judicial confession is sufficient to found a capital conviction upon, although uncorroborated by any independent proof of the *corpus delicti*. *Id.*
5. An extra-judicial confession, with extrinsic circumstantial evidence satisfying the minds of a jury beyond a reasonable doubt that the crime charged has been committed, will warrant a conviction, although the dead body may not have been discovered and seen so that its existence and identity can be testified to by an eye-witness. *Id.*
6. The St. Louis criminal court has power, of its own motion, to order a removal of a cause to the St. Louis circuit court on the ground that the judge of the said criminal court has been of counsel for the defendant; the local act of December 11, 1855, (R. C. 1855, p. 1591), is confined to changes of venue made upon the application of the defendant. *State v. Houser*, 232.
7. Where an instruction given by the court could have had no influence on the verdict—there being no evidence upon which to ground it—an inquiry into its propriety as an abstract proposition of law will not be held obligatory on the supreme court. *Id.*

CRIMES AND PUNISHMENTS—(Continued.)

8. Where it is sought to show the presence of the defendant at the time and place of the homicide by showing the identity of a shirt, with marks of blood upon it, found at the place of the homicide on the morning after its commission, with a shirt worn by the defendant on the day of the homicide, the fact, testified to by the person, a relative of defendant, at whose house the homicide was committed, that she gave the shirt up to the brother of the defendant on his demand, is evidence tending to show the real opinion of the witness as to the question of identity and ownership of the shirt—she having stated that when she gave the shirt to the brother she told him that she did not think it belonged to the accused. *Id.*
9. The fact that a slung-shot was discovered in the pocket of a person on trial for a capital crime when about to be brought into court to be present at the rendition of the verdict is admissible in evidence against the accused on a second trial. *Id.*
10. When a slave is cruelly or inhumanly abused by a person who does not have such slave in his employment or under his charge, power or control, resort can not be had, in the punishment of such an offence, to an indictment founded on the forty-eighth section of the eighth article of the act concerning crimes and punishments. (R. C. 1855, p. 634.) *State v. Peters*, 241.
11. A. was indicted for stealing certain cattle alleged in the indictment to be the property of B. At the trial, one C., who had been summoned as a juror, stated, upon his *voir dire*, that he knew the cattle alleged to have been stolen; that his brother had once owned them, and had sold them to one K., who had sold them to B. *Held*—the allegation as to B.'s ownership not being controverted on the trial—that C. was a competent juror. *State v. Martin*, 530.
12. Although cattle may have wandered away from the owner's enclosure, and the owner may not know where they are, yet if another coming across them drives them off and converts them feloniously to his own use, he is none the less guilty of larceny because he is ignorant of their true owner and their owner may not know where they are; the ownership draws along with it the possession under such circumstances. *Id.*
13. Where declarations or statements made by an accused person are admitted in evidence against him, he has a right to insist that the whole of his statements and not a portion merely shall go before a jury; what credit shall be attached to the whole, or any part thereof, is a matter exclusively for the jury. *Id.*
14. A druggist who, in good faith, sells intoxicating liquor, whisky, for medical purposes, can not be rendered liable to an indictment for selling liquor in a less quantity than a gallon; he is not required to institute a strict inquisition into the motives and objects of the persons dealing with him. *State v. Mitchell*, 562.
15. A dealer in drugs and medicines is a merchant within the meaning of the first section of the act to tax and license merchants. (R. C. 1855, p. 1072.) *State v. Wells*, 565.

CRIMES AND PUNISHMENTS—(Continued.)

16. To constitute a merchant a dealer in drugs and medicines within the meaning of the twenty-second section of the act to tax and license merchants (R. C. 1855, p. 1077) so as to authorize him, under his license as a merchant, to sell spirituous liquors in any quantity when it is used only for medical purposes, it is necessary that he should be engaged principally in selling drugs and medicines, though he may incidentally admit into his store and may vend articles not strictly falling under the denomination of drugs and medicines. *Id.*
17. A general verdict against a defendant in a criminal case will authorize a judgment thereon if there is a single good count in the indictment. *State v. Montgomery*, 594.
18. It is competent in a criminal case, as affecting the credibility of a witness, to inquire into the state of his feelings towards the party against whom he is called upon to testify; this inquiry can not, however, be made concerning the witness' feeling towards the husband of such party. *Id.*
19. In an indictment founded on the fifteenth section of the second article of the revenue act of 1857, (Sess. Acts, 1857, Adj. Sess. p. 79,) for delivering to the assessor a false and fraudulent list of taxable property, it must appear in what respect the list delivered is false and fraudulent; the indictment must set out, in terms of general description at least, the taxable property owned by the defendant and fraudulently omitted in the list delivered. *State v. Welch*, 600.

CUSTOM.

See COMMON CARRIER.

D

DAMAGES.

See ATTACHMENT, 6.

1. Whether a sum stipulated to be paid in case of the breach of the provisions of a contract is to be regarded as a penalty or as liquidated damages must be determined by the nature of the contract and its provisions; if the whole scope of the instrument shows that it is stipulated for as a penalty the parties can not constitute it liquidated damages by designating and stipulating for it as such. *Basye v. Ambrose*, 39.
2. Where the agreement secures the performance or omission of various acts which are not measurable by any exact pecuniary standard, together with one or more acts in respect of which the damages on a breach of covenant are readily ascertainable by a jury, and there is a sum stipulated for as damages for a breach of any one of the covenants, such sum is a penalty merely. *Id.*
3. In actions founded on the "act to prevent certain trespasses," (R. C. 1845, p. 1068,) the jury can assess single damages only; the jury should assess the value of the property taken or injured; the court will then, if a proper case be made out, give judgment for treble the amount so assessed. *Brewster v. Link*, 147.

DAMAGES—(Continued.)

4. The question of "probable cause" is in such cases to be determined by the court. *Id.*
5. Where the petition contains counts under the statute and at common law, and the jury render a general verdict, the court is not authorized to treble the damages. *Id.*
6. Relief against penalties will not be afforded at the instance of the persons in whose behalf the penalties are stipulated for. *Stillwell v. Temple*, 156.
7. A. leased a dwelling-house to B. for one year. A. stipulated in the contract of lease that he would at any time during the year sell and convey the premises to B. on certain specified terms. B. covenanted that he would during the term demand a conveyance and comply with the conditions of sale. It was further agreed as follows: "Upon the completion of said sale and purchase as and in the manner aforesaid, said lease and rent shall cease; and to secure the faithful payment of said rent and making of said purchase as and in the manner aforesaid, the said B., has assigned unto said A. his right and title to three hundred shares of the capital stock of the St. L. & B. Mining Company, now owned by him, which shall become the absolute property of said A. without redemption, and as and for liquidated damages and not as a penalty, in case said B. should fail faithfully to pay said rent and make said purchase when and in the manner aforesaid; but upon such faithful performance the stock shall revert and be reassigned to him." B. failed to pay the rent or to make the purchase as agreed. A. brought suit against B. to recover one year's rent of the premises and damages for the failure of B. to purchase the premises; he did not offer to return the stock mentioned in the contract or to give credit for its value. *Held*, that A. was not entitled to recover; that the stipulation with respect to stock, whether regarded as a penalty or as stipulated damages, was a bar to such recovery. *Id.*
8. In an action in the nature of an action of trover for the conversion of a promissory note, the measure of damages, *prima facie*, is the amount called for on the face of the note. *Bredow v. Mutual Savings Institution*, 181.
9. Where a hand, employed on a steamboat for a trip at certain agreed wages per month, is, without cause, discharged before the termination of the trip, he may recover compensation at the agreed wages for a trip of the usual length; if the trip should be extended by accident beyond the usual period, he could not recover full wages for the whole time including the accidental detention. *Cunningham v. Steamboat Low-water*, 338.
10. Where, in an action for the possession of personal property, the plaintiff gives bond and receives possession of the property, and the cause is tried by a jury, the jury, regularly, in case of finding for the defendant, should assess the *value* of the property, as also the damages. *Hohenthal v. Watson*, 360.
11. In an action of ejectment for the recovery of leasehold premises, the plaintiff can not recover by way of damages the rents and profits beyond the time of the expiration of his title. *Gutzweiler v. Lachman*, 434.

DANGERS OF THE RIVER.

See **COMMON CARRIER.**

DEALER IN DRUGS AND MEDICINES.

See **MERCHANT'S LICENSE.**

DEEDS OF TRUST.

See **EQUITY. FRAUD AND FRAUDULENT CONVEYANCES. CONVEYANCES.**

DEPOSITIONS.

1. A notice to take depositions that is unsigned is insufficient; depositions taken upon such a notice, the opposite party not attending, either in person or by attorney, at the time and place specified in the notice, may be suppressed. *Bohn v. Devlin*, 319.
2. When either party to a cause offers to read a deposition taken therein, he must read the whole of it, except such portions, if any, as are ruled out by the court as inadmissible. *Hill v. Surgeon & Raulings*, 323.

DILIGENCE.

See **CARE.**

DIVORCE.

1. The conduct of a husband toward a wife may be such as to warrant her in leaving him, although it would not entitle her to a divorce; if her absence be caused by his misconduct, or if he place himself in such a situation as to prevent her return, he will not be entitled to a divorce, although she may have lived separate from him for a number of years. *Gillinwaters v. Gillinwaters*, 60.
2. It does not follow as a matter of course that the party prevailing in a suit for a divorce shall have the care and custody of the children; the court may, in its discretion, if the good of the children require it, grant the care and custody of them to the other parent. *Lusk v. Lusk*, 91.
3. The legislature of the former territory of Missouri had no power by legislative act to grant divorces. (Per *NAPTON*, Judge; *SCOTT*, Judge, not concurring, holding that the territorial legislature had such power.) *Chouteau v. Magen*, 187.

DOWER.

1. Where a father gives money to his married daughter, though not to her separate use, and the husband purchases land therewith in his own name, such land will be deemed to have come to the husband in right of the marriage within the meaning of the third section of the dower act of 1845, (R. C. 1845, p. 430, § 3,) and if it remain undisposed of at the death of the husband, the widow will be entitled to it. *Cason v. Cason*, 47.
2. To entitle a widow to dower under the third section of the dower act of 1845 (R. C. 1845, p. 430), it was necessary that she should make her election so to take in the mode prescribed by the seventh section of said act; otherwise she would be entitled to dower under the first section. *Welch v. Anderson*, 293.
3. The right of the widow in such case to elect is strictly personal; it is not transmissible by descent. *Id.*

DOWER—(*Continued.*)

4. The widow and the heirs may, by agreement and without a formal election by the widow, determine the kind and quantity of estate she shall take as dower. *Id.*
5. To entitle a widow to dower under the first section of the dower act (R. C. 1855, p. 668), it is not necessary that she should elect so to take. No election to take dower under the first section of the act can, as an election, take away her right to elect to be endowed under the eleventh section of said act. To overthrow this right, there must be a binding contract or such facts and circumstances as will work an estoppel *in pais*. *Watson v. Watson*, 300.
6. The institution of a suit by a widow to recover dower according to the first section of the dower act, and the declaration in the petition in such suit, which is signed and sworn to by her, that she thereby elects to take as her dower the third part of the lands of the deceased husband, will not take away her right to elect, within eighteen months after the grant of letters testamentary or of administration, to take dower under the eleventh section of said dower act. *Id.*

DRAM-SHOPS.

1. Under an indictment, founded on the act, approved December 13, 1855, regulating dram-shops, (R. C. 1855, p. 682,) charging that the defendant unlawfully sold a quantity of spirituous liquor, to-wit, one pint of whisky, without having a dram-shop keeper's license or any other authority for that purpose; it might be shown that the defendant sold a quantity of whisky less than a pint; it would not be a fatal variance. *State v. Andrews*, 17.
2. The act regulating dram-shops, approved December 13, 1855, (R. C. 1855, p. 683) and the act to tax and license merchants, approved December 11, 1855 (R. C. 1855, p. 1077, § 22,) did not affect the validity of an unexpired grocer's license granted previous to May 1, 1856. *State v. Andrews*, 14.
3. The revised code of 1855 repealed the third section of the act of March 25, 1845, (R. C. 1845, p. 542); consequently a grocer, under an unexpired license granted previous to May 1, 1856, might permit intoxicating liquor sold by him after May 1, 1856, to be drank at a place under his control. *Id.*

DRUGS AND MEDICINES.

See MERCHANT'S LICENSE.

DURESS.

1. Courts of equity will set aside deeds obtained by duress. *Bray v. Thatcher*, 129.

E

EJECTMENT.

See LANDS AND LAND TITLES. CONVEYANCE.

1. If the plaintiff in an action of ejectment fail at the trial to establish his right to a recovery upon the title relied on by him, he may resort to

EJECTMENT—(Continued.)

- another title; it is improper to require him to elect one of two titles, upon which he announces his purpose to rely, as that upon which he must base his right to a recovery, even though such titles be inconsistent with each other. *St. Louis Public Schools v. Risley*, 415.
2. In an action of ejectment for the recovery of leasehold premises, the plaintiff can not recover by way of damages the rents and profits beyond the time of the expiration of his title. *Gutweiler v. Lachman*, 434.

ELECTION.

See DOWER. EJECTMENT.

ELECTIONS.

1. Where an inferior judicial tribunal declines to hear a cause upon what is termed a preliminary objection—as where, in a statutory proceeding instituted to contest the election of a sheriff, the court refuses to try the cause upon the merits but dismisses the same and quashes the proceedings on the ground that the contestant had not given the notice required by the statute—a mandamus will lie from the supreme court commanding the inferior court to reinstate the cause upon its docket and proceed to try the same, if such court had misconstrued the law in such preliminary matter. (SCOTT, Judge, dissenting.) *Castello v. St. Louis Circuit Court*, 259.
2. In proceedings instituted under the act regulating elections to contest the election of a sheriff, the contestant must, as required by the fifty-fifth section of said act, give notice in writing within twenty days after the votes are officially counted; the essential constituents of the notice in such case are set forth in the fiftieth section of said act; only one notice is contemplated or required. *Id.*
3. Should the contestant not give the required notice, the court should quash the proceedings. *Id.*

EQUITY.

See PRACTICE, 34, 35. FRAUD AND FRAUDULENT CONVEYANCES. JUSTICES' COURTS. SLAVERY, 2. PRACTICE, 10. RESULTING TRUSTS. CARONDELET. PARTITION. LANDS AND LAND TITLES.

1. If one comes into the possession of trust property, whether by suit or otherwise, he will hold it in trust for the *cestui que trust*. *Coffee's Administratrix v. Crouch*, 106.
2. S. & R. were partners. A. was security for S. for \$804; R. was also security for S. for \$695. S., to secure A. and R. against these liabilities, executed to A. and R. a mortgage of his interest in the partnership effects, consisting of lands, goods, accounts, &c., with authority in A. or R. or either of them to take possession, and, in the event of default of payment of the secured debts by S., to apply the property or its proceeds to their payment. R. at the same time gave to A. a separate obligation in writing by which he stipulated that the debt for which A. was bound should be first paid out of the mortgaged property, and also gave him verbal assurances that the property was amply sufficient for

EQUITY—(*Continued.*)

- this purpose. R. took sole possession of the mortgaged property, but paid no portion of the debt for which A. was security; he did pay off a portion of the debt for which he, R., was security, and refuses to render any account of the partnership. S. is insolvent. *Held*, in a suit instituted by A. against R. and S. for the purpose of obtaining a due appropriation and management of the mortgaged property, that S. was properly joined as a party defendant to such suit; that it was not necessary, in order to enable A. to maintain such suit, that he should first pay off the debt for which he was security; it was sufficient if there was reason to apprehend a misappropriation of the mortgaged property or its conversion to uses other than those provided for in the mortgaged deed; that it constituted no legal impediment in the way of the maintenance of such a suit by A. that he had acquiesced in the exclusive possession and management of the property by R.; that R. having taken possession of the property and entered upon the discharge of the trust imposed upon him by the mortgage and his agreement with A., neither he nor S. could set up that the mortgage was void for uncertainty in the description of the property. *Anthony v. Ray & Somerville*, 109.
3. Courts of equity will set aside deeds obtained by duress. *Bray v. Thatcher*, 129.
 4. Relief against penalties will not be afforded at the instance of the persons in whose behalf the penalties are stipulated for. *Stillwell v. Temple*, 156.
 5. A bill of peace to restrain a person from instituting ejectment suits against another, on the ground that such suits would be vexatious, can not be maintained unless the title to the land in dispute has been fully and satisfactorily litigated at law; the institution of repeated ejectment suits, if the same are abandoned before trial, can not furnish a foundation for the maintenance of a bill of peace to restrain vexatious litigation. *Patterson v. McCamant*, 210.
 6. Where in a partition suit a sale of the premises is ordered, and previous to the sale it is agreed between certain parties in interest that one of their number shall bid off the property at such sale unless it brings a certain price, and hold it for the benefit of the parties to the agreement and such others of those interested as may choose to become parties thereto, and that the others shall abstain from bidding at such sale, and he does purchase the property under such agreement; *held*, that he will hold it in trust for all the parties in interest. *Northcraft v. Martin*, 469.
 7. Where a party purchasing land causes the legal title to be placed in a third person with a view to defraud his creditors, there will be a resulting trust to himself for the benefit of such creditors, and this interest may be seized and sold on execution under a judgment against him in favor of one of those creditors; the purchaser may then, in a proceeding for that purpose, and upon establishing the alleged fraud, have a decree vesting the legal title in himself and for the possession of the land. *Dunnica v. Coy*, 525.

EQUITY—(Continued.)

8. A. conveyed to B. a slave in trust to secure and indemnify the latter against loss by reason of his being security for A. B. acting under a power in the deed of trust sold said slave to C., taking a bond to himself "as trustee of A." for a portion of the purchase money. The slave was afterwards taken from the possession of C. by the true owner from whom A. had stolen him. *Held*, that there was a failure of consideration of the bond, and payment thereof could not be enforced against C. *Long v. Gilliam*, 560.
9. Should a testator, by reason of a failure to name or provide for some of his children in his will, be deemed in law to have died intestate as to those not named, they can not maintain against the devisees an action for the partition of the property embraced in the devise; resort must be had to a petition for contribution, in which the equities arising out of advancements may be adjusted. *Hill v. Martin*, 78.

ESTOPPEL.

See DOWER.

1. When the record proper of a cause shows that a demurrer to a petition has been regularly heard, considered and overruled, the objection will not be entertained in the supreme court that the court overruled the demurrer without hearing counsel. *The State, to use, &c., v. Sanger*, 314.

EVIDENCE.

See FRAUD AND FRAUDULENT CONVEYANCES, 3. AGREEMENT, 5.

1. Under an indictment, founded on the act, approved December 13, 1855, regulating dram-shops, (R. C. 1855, p. 682,) charging that the defendant unlawfully sold a quantity of spirituous liquor, to-wit, one pint of whisky, without having a dram-shop keeper's license or any other authority for that purpose; it might be shown that the defendant sold a quantity of whisky less than a pint; it would not be a fatal variance. *State v. Andrews*, 17.
2. In a statutory proceeding to contest the validity of a will, the burden of proof rests upon the defendants; consequently they have the right to open and close the case to the jury. *Cravens v. Falconer*, 19.
3. A defendant can not be permitted to introduce evidence to support a defence to the action not set up in his answer. *Winston v. Taylor*, 82.
4. Mere hearsay testimony, the acts and declarations of third persons in no way related to the party against whom it is sought to use them, is inadmissible. *Atkison v. Steamboat Castle Garden*, 124.
5. Where a deposition is offered in evidence, and its admission is objected to for various reasons, if the objection that the absence of the witness has not been accounted for be not made, it will be deemed to have been waived. *Dickerson v. Chrisman*, 134.
6. Declarations of a grantor of real estate, made before the grant, to the effect that he had previously sold said real estate to another, are admissible in evidence against such grantee and all persons claiming under him. *Id.*

EVIDENCE—(Continued.)

7. In a suit against a corporation, a stockholder thereof is a competent witness in behalf of the corporation. (*Barclay v. Globe Mutual Insurance Co.* 26 Mo. 490, affirmed.) *Bredow v. Mutual Savings Institution*, 181.
8. To render a voluntary confession, made by an accused person before a committing magistrate and reduced to writing by the latter, admissible in evidence on the trial, it is not necessary that the record of the proceedings of the magistrate should show specifically that the prisoner was distinctly informed of the charge made against him and that he was at liberty to refuse to answer any question put to him, and that a reasonable time was allowed the prisoner to advise with his counsel and for that purpose to send for counsel; it is sufficient if it be shown upon the trial, by the testimony of the committing magistrate, that the requirements of the statute in this regard had been complied with. *State v. Lamb*, 218.
9. A judicial confession is sufficient to found a capital conviction upon, although uncorroborated by any independent proof of the *corpus delicti*. *Id.*
10. An extra-judicial confession, with extrinsic circumstantial evidence satisfying the minds of a jury beyond a reasonable doubt that the crime charged has been committed, will warrant a conviction, although the dead body may not have been discovered and seen so that its existence and identity can be testified to by an eye-witness. *Id.*
11. Where it is sought to show the presence of the defendant at the time and place of the homicide by showing the identity of a shirt, with marks of blood upon it, found at the place of the homicide on the morning after its commission, with a shirt worn by the defendant on the day of the homicide, the fact, testified to by the person, a relative of defendant, at whose house the homicide was committed, that she gave the shirt up to the brother of the defendant on his demand, is evidence tending to show the real opinion of the witness as to the question of identity and ownership of the shirt—she having stated that when she gave the shirt to the brother she told him that she did not think it belonged to the accused. *State v. Houser*, 233.
12. The fact that a slung-shot was discovered in the pocket of a person on trial for a capital crime when about to be brought into court to be present at the rendition of the verdict is admissible in evidence against the accused on a second trial. *Id.*
13. The mode of authenticating the laws and records of the different states prescribed by the laws of the United States, is not exclusive of the common law modes of proving the same; thus, where the general banking law of a sister state requires articles of association entered into in pursuance thereof to be recorded and makes a duly certified copy of the record evidence, a sworn copy of such record is admissible in the courts of this state. *Karr v. Jackson*, 316.
14. A pilot, who is acquainted with the place of a steamboat disaster and with the character for skill of the pilot or steersman in charge of the boat at the time of the disaster, may testify as to whether it was pru-

EVIDENCE—(Continued.)

- dent to allow the latter to pilot the boat at the time of the accident. *Hill v. Sturgeon & Rawlings*, 323.
15. When either party to a cause offers to read a deposition taken therein, he must read the whole of it, except such portions, if any, as are ruled out by the court as inadmissible. *Id.*
 16. The cause of action set forth in a petition must be supported by the evidence, otherwise there will be a fatal variance. *Gregg v. Robbins*, 347.
 17. A defendant should not be permitted to introduce evidence to support a defence not set up in his answer. *Lynch v. Morrow's Adm'r*, 357.
 18. Where a presumption is one of fact merely, a court is not warranted in declaring it to the jury as a presumption raised by law. *Ham v. Barret*, 388.
 19. The presumption of the payment of a debt, arising from the fact that a subsequent demand due on the same account and arising from the same cause has been regularly discharged, is a presumption of fact. *Id.*
 20. Although a witness, a surveyor, should be improperly permitted to give his opinion upon a matter of law, as to declare what are the controlling calls of a deed, a judgment will not be reversed for this impropriety, if the opinion given be substantially correct and such as can not have prejudiced the party complaining of it. *Whittelsey v. Kellogg*, 404.
 21. Where an instrument purporting to be the act of a corporation has the common seal of the corporation attached, and the signatures of the proper officers are proved, it will be presumed that such officers had authority from the corporation to execute the same. *St. Louis Public Schools v. Risley*, 415.
 22. The secretary of the board of directors of the St. Louis Public Schools is a proper person to whom to deliver applications for renewal of leases made by said board with covenants of renewal. The declarations of a deceased secretary, made when applied to in behalf of an applicant for renewal before the expiration of the time within which demand of renewal should be made, are admissible in evidence to show that the application for renewal had been received by him as secretary in due time. *Blackmore v. Boardman*, 420.
 23. The fifty-eighth section of the act concerning evidence (R. C. 1855, p. 733) is not, it seems, applicable to the case of the record of a deed defectively acknowledged; a certified copy of the record of such a deed and of the time of its record, though accompanied with proof of claim and enjoyment under such deed for ten consecutive years, would not, under said section, be *prima facie* evidence of its execution and genuineness. *Garnier v. Barry*, 438.
 24. Hunt's minutes of testimony taken by the act of Congress of May 26, 1824, are not admissible in evidence except to prove such facts as may be proved by hearsay. If professedly admitted to prove such facts, care should be taken that they are not used for other and illegal purposes. *Williams v. Carpenter*, 453.
 25. Where a deed, purporting to be the deed of a corporation, is admitted,

EVIDENCE—(*Continued.*)

- and no objection is made to its introduction on the ground that the corporate seal has not been proved, this objection will not be entertained in the supreme court. *Chouquette v. Barada*, 491.
26. Where an instrument purporting to be the act of a corporation has the common seal of the corporation attached, and has been signed by the proper officer, it will be presumed that it was executed by authority of the corporation. *Id.*
 27. The certificates of confirmation issued by Recorder Hunt under the act of Congress of May 26, 1824, are *prima facie* evidence of title by virtue of the act of Congress of June 13, 1812, as against persons claiming by title emanating from the United States in the year 1820. *Milburn v. Hardy*, 514.
 28. So also surveys by the United States of the lots embraced in the certificates issued by Recorder Hunt under said act of May 26, 1824, are admissible in evidence as against persons claiming by titles acquired from the United States prior to the passage of said act of May 26, 1824. *Id.*
 29. Hearsay testimony is inadmissible in evidence. *State v. Martin*, 530.
 30. Where declarations or statements made by an accused person are admitted in evidence against him, he has a right to insist that the whole of his statements and not a portion merely shall go before a jury; what credit shall be attached to the whole, or any part thereof, is a matter exclusively for the jury. *Id.*
 31. A clerk in the patent office, whose employment consists chiefly in making examinations in relation to assignments and other papers recorded and filed in the office, is a competent witness to prove what documents are of record or on file in said patent office. *Sone v. Palmer*, 539.
 32. Declarations of the defendant in the attachment made after the attachment are inadmissible in his favor to explain away the effect of previous declarations. *Tucker v. Frederick*, 574.

EXECUTION.

See SHERIFF. CLAIM AND DELIVERY OF PERSONAL PROPERTY.

1. When the defendant in an execution is not a resident of the county in which the land sought to be sold is situated, the plaintiff in the execution should give notice to the defendant of the issuing of the same as required by section 46 of the act regulating executions. (R. C. 1855, p. 766, § 46.) Should no such notice be given, and property be levied on and sold under the execution, the defendant may on the return day of the execution move the court to set aside such sale, and the court should set aside the same although the sheriff may have executed the deed to the purchaser before the return day of the execution. *Ray v. Stobbs*, 35.
2. Where, in St. Louis county, a levy of an execution or attachment is made upon personal property, a person other than the defendant in such execution or attachment, claiming the property so levied on, has a choice of remedies. He may make claim to the property in accordance with the third section of the local act of March 3, 1855, (Sess.

EXECUTION—(Continued.)

- Acts, 1855, p. 464); in which case, if the sheriff or other officer demands and receives a *sufficient* indemnification bond from the plaintiff in the execution or attachment, the claimant will have no remedy against the officer but must resort to a suit on the indemnification bond. Should the claimant, however, not make claim in the manner provided in said section, he may maintain an action against the sheriff or other officer for the possession of the property levied on. *Bradley v. Holloway*, 150.
3. A sheriff or other officer levying an execution or attachment is not authorized, under said act of March 3, 1855, to demand an indemnification bond of the plaintiff in the execution or attachment unless claim is made to the property levied on substantially as provided in the third section of said act. *Bradley v. Holloway*, 150.
 4. If a levy of an execution be made upon property not belonging to the defendant therein and such execution returned satisfied to the amount made by the execution sale, should the plaintiff in the execution be compelled to refund to the true owner the amount received by him from such sale, he will be entitled to have the satisfaction endorsed on the execution set aside and to have an execution issue for the full amount of the judgment. *Magwire v. Marks*, 193.
 5. A. recovered a judgment against B. Execution was issued thereon and levied by order of A.—he giving the plaintiff an indemnification bond—on certain personal property in possession of B. but known by A. to be claimed by C. as trustee for the wife of B. The sheriff made sale of the property levied on, and the amount made was endorsed on the execution in *pro tanto* satisfaction thereof. C. sued the sheriff and recovered judgment against him for the amount made by said levy and sale, with interest, which was paid by A. *Held*, that A. was entitled to have the sheriff's return vacated and set aside so far as it stated a partial satisfaction of the execution, to have the same amended in accordance with the facts, and to have an execution issue for the whole amount of the judgment. *Id.*
 6. Where a sheriff receives a writ of execution and does not levy the same during his term of office, it is his duty, at the expiration of his term, to deliver said writ to his successor in office, whose duty it is to receive and execute the same. *Dunnica v. Coy*, 525.

F

FEES.

1. The fees of the clerks of the county courts for services rendered by them under the revenue act of Nov. 23, 1857, (Sess. Acts, Adj. Sess. 1857, p. 75,) are regulated by that act and not by the act of 1855 concerning fees. The clerks are entitled to receive five cents per hundred words and figures for making out and copying the tax books, abstract books, lists and all papers required to be copied or made out under said act of Nov. 23, 1857. *Harris v. Buffington*, 53.

FIRE INSPECTOR.

See CITY OF ST. LOUIS.

FIXTURES.

1. By the general law, if a tenant make erections and improvements upon the leased land and so connect the same with buildings already erected that they can not be separated or removed without material injury to the landlord's property, such erections or structures will be deemed in law fixtures as against such tenant, and he can not remove the same. *Powell v. McAshan*, 70.

FORCIBLE ENTRY AND DETAINER.

1. Where a tenant, after the termination of the time for which the premises are demised to him, willfully holds over, no demand in writing is necessary to enable the landlord to maintain an action for unlawful detainer against him. *Young v. Smith*, 65.
2. Where the term of a tenant is to end at a time certain, no notice to quit is necessary, whether the term is for less or more than a year. *Id.*
3. To authorize the maintenance of an action for unlawful detainer, it is not necessary that the plaintiff should have been in the possession of the premises; a grantee can maintain such action if his grantor could. *Id.*

FOREIGN CORPORATION.

See ATTACHMENT. CORPORATION. INSURANCE.

FRAUD AND FRAUDULENT CONVEYANCES.

See EQUITY. STATUTE OF FRAUDS.

1. A judgment procured by fraud should be set aside at the instance of the party against whom it was rendered. *Miles v. Jones*, 87.
2. In order that fraudulent representations made by a vendor to a vendee with respect to the character of the improvements upon the land sold may be the basis of relief to the purchaser in an action by the vendor on a promissory note given for a portion of the purchase money, it must appear that the misrepresentations were made with respect to something material and constituting an inducement to the contract. *Hodges v. Torrey*, 99.
3. A. conveyed a stock of goods in trust to secure certain notes in favor of B. In the deed it was stipulated that the property conveyed should remain in the possession of A. until the maturity of the notes secured, when, if they were not paid, the trustee might take possession and sell. A. remained in possession and continued to sell in the usual course of business. C., a creditor of A., sued out an attachment against A. on the ground that he had fraudulently conveyed and assigned his property so as to hinder and delay his creditors. *Held*, that the declarations of B., (he not being a party to the suit and being a competent witness for either party and not shown to have conspired with A.,) made in the absence of A., to the effect that A. had the right to sell the goods embraced in the deed of trust in the ordinary course of business, were inadmissible in evidence. *Reed v. Pelletier*, 173.

FRAUD AND FRAUDULENT CONVEYANCES—(Continued.)

4. The constructive fraud against creditors, which exists where it is understood between the grantor in a deed of trust conveying a stock of goods and the *cestui que trust* that the former is to remain in possession and continue to sell in the ordinary course of business, is sufficient to support an attachment under the seventh clause of the first section of the attachment act. *Id.*
5. Where there is a reservation or limitation of personal property by way of condition, reservation or remainder, or otherwise, the same not being declared by will or deed duly proved or acknowledged and recorded, such reservation will not, by the operation of the fifth section of the act concerning fraudulent conveyances (R. C. 1855, p. 803), be rendered void as to the creditors and purchasers of the person in possession, unless such possession shall have continued for the space of five years. *Miller v. Bascomb*, 352.
6. Where personal property is sold and delivered to a person with the understanding that it is to remain the property of the vendor until the purchase money is paid, this "reservation or limitation" in favor of the vendor is not invalidated by the operation of the fifth section of the act concerning fraudulent conveyances, by reason of a failure to declare the same by will or deed duly proved or acknowledged and recorded; said section has no such operation unless possession has continued for five years. *Id.*
7. *Layson v. Rogers*, 24 Mo. 192, explained and modified. *Id.*
8. The mere fact, that the grantor in a deed of trust which is recorded remains in possession of the trust property, is no evidence of fraud; the record is in such case equivalent to a transmutation of possession. *Id.*
9. *Quere*, how far is a deed of trust conveying a stock of goods in trade and also all goods and stock that may belong to the grantor during the continuance of the trust valid and operative? *Hall v. Webb*, 408.
10. Where property is assigned for the benefit of creditors, and a sale is made by the trustee under such assignment, the fact, that a purchaser at such sale purchases the property for the benefit of the grantor in the deed of trust and with a view to permit him to enjoy the benefit of it, will not render the transaction void as to creditors; nor would it be rendered void by the fact that the purchase was made with the understanding that the grantor should have the privilege of redeeming on payment of the sum advanced. It would be otherwise if the purchase had been made with money furnished by the grantor in the deed of trust. *Gutweiler v. Lachman*, 434.
11. Where a party purchasing land causes the legal title to be placed in a third person with a view to defraud his creditors, there will be a resulting trust to himself for the benefit of such creditors, and this interest may be seized and sold on execution under a judgment against him in favor of one of those creditors; the purchaser may then, in a proceeding for that purpose, and upon establishing the alleged fraud, have a decree vesting the legal title in himself and for the possession of the land. *Dunnica v. Coy*, 525.

FRAUD AND FRAUDULENT CONVEYANCES—(*Continued.*)

12. Whenever it appears from the face of an assignment of a stock of goods to a trustee for the benefit of certain designated creditors, that it is the intention of the parties thereto that the grantor shall be allowed to remain in possession of the property assigned, and to dispose of the same in the usual course of business until default, such deed of assignment is a conveyance in trust to the use of the grantor within the first section of the act concerning fraudulent conveyances, and consequently void as against creditors; it is sufficient to avoid the assignment that such appears, from a consideration of the whole instrument, to be the intent of the parties. (*Stanley v. Bunce*, 27 Mo. 269.) *Billingley's Adm'r v. Bunce*, 547.

FREEHOLD.

See CONVEYANCE, 16, 17.

G

GARNISHMENT.

See ATTACHMENT.

GRANTS TO RAILROADS.

See RAILROADS.

GROCER'S LICENSE.

See MERCHANT'S LICENSE.

1. The act regulating dram-shops, approved December 13, 1855, (R. C. 1855, p. 683) and the act to tax and license merchants, approved December 11, 1855 (R. C. 1855, p. 1077, § 22,) did not affect the validity of an unexpired grocer's license granted previous to May 1, 1856. *State v. Andrews*, 14.
2. The revised code of 1855 repealed the third section of the act of March 25, 1845, (R. C. 1845, p. 542); consequently a grocer, under an unexpired license granted previous to May 1, 1856, might permit intoxicating liquor sold by him after May 1, 1856, to be drank at a place under his control. *Id.*

GUARANTY.

See PLEADING, 3.

H

HUNT'S CERTIFICATES.

See LANDS AND LAND TITLES.

HUSBAND AND WIFE.

See DIVORCE. CONVEYANCE. DOWER.

1. Where a father gives money to his married daughter, though not to her separate use, and the husband purchases land therewith in his own name, such land will be deemed to have come to the husband in right

HUSBAND AND WIFE—(*Continued.*)

of the marriage within the meaning of the third section of the dower act of 1845, (R. C. 1845, p. 430, § 3,) and if it remain undisposed of at the death of the husband, the widow will be entitled to it. *Cason v. Cason*, 47.

2. The proviso of the act of June 22, 1821, (1 Terr. Laws, 756,) to the effect that nothing therein contained should "in anywise authorize husband and wife to convey [any] estate granted to the wife and heirs after intermarriage" does not apply to a confirmation, by the act of Congress of June 13, 1812, of a Spanish concession or claim cast upon the wife by descent previous to her marriage; nor does said proviso apply to the case of an inheritance by a wife during marriage of such a confirmation; husband and wife might, under said act of June 22, 1821, convey land thus confirmed to the wife during marriage, or thus falling to her by inheritance. *Garnier v. Barry*, 438.

I

IMPROVEMENT ON PUBLIC LANDS.

See AGREEMENT, 1.

INDEMNIFICATION BOND.

See SHERIFF. EXECUTION.

INDICTMENT.

See CRIMES AND PUNISHMENTS.

INJUNCTION.

1. A. let certain premises to B. for a term of years; the letting, being by parol, had the force and effect at law of a tenancy from year to year. A. gave B. due notice to quit, and brought his action of forcible detainer before a justice of the peace. B. relied for a defence upon the fact that he had entered upon said premises under a parol lease for ten years, while the building thereon was not completed, and had made improvements thereon, and had paid rent under said parol agreement. *Held*, that the justice of the peace had no jurisdiction to enforce the equities arising out of such a defence, and that, if the defendant was entitled to the specific enforcement of the parol agreement, he might have enjoined in a court of competent jurisdiction the proceedings before the justice until his equity could be determined. *Ridgley v. Stillwell*, 400.

INSTRUCTIONS.

See PRACTICE, 14, 40, 42.

INSURANCE.

1. Foreign incorporated insurance companies, which have established agencies within this state, and whose agents have complied with the provisions of the act licensing and regulating agencies of foreign insurance companies (R. C. 1855, p. 884), are subject to garnishment process.

INSURANCE—(Continued.)

McAllister v. Pennsylvania Insurance Co., 214; *Same v. Commonwealth Insurance Co.*, 214.

2. Service of garnishment process may be had in such case upon the authorized agent of the foreign insurance company, he being a chief or managing officer thereof within the meaning of the twenty-sixth section of the first article of the attachment act. *Id.*
3. Should an insurance company wrongfully refuse to receive premiums due on a life policy, the assured may treat the policy at an end, and may recover back all the premiums paid under it. *McKee v. Phoenix Insurance Co.*, 383.
4. Where the life of a husband is insured for the benefit of the wife, the policy is not necessarily determined by the wife's obtaining a divorce from the husband; she may still have, it seems, an insurable interest in the life of the divorced husband that will support the policy. *Id.*

INTOXICATING LIQUOR.

See CRIMES AND PUNISHMENTS. MERCHANT'S LICENSE.

J

JUDGMENT.

See JURISDICTION. COUNTY COURTS.

1. A judgment procured by fraud should be set aside at the instance of the party against whom it was rendered. *Miles v. Jones*, 87.
2. The rule that a judgment is an entire thing, and if reversed as to one must be reversed as to all, is only applicable to judgments at law. *Dickerson v. Chrisman*, 134.

JUDGMENT BY CONFESSION.

1. A verified statement upon which a confession of judgment is rendered must state concisely the facts out of which the indebtedness arose. If it state the execution of a promissory note to the plaintiff; that "said note was given for goods, wares and merchandise sold by the plaintiff to the defendant before the date thereof," it will be materially defective. *Bryan v. Miller*, 32.
2. A judgment rendered upon such a statement, though not valid as to other judgment creditors, would be valid between the parties thereto. The defective statement might be amended, but not so as to affect rights of existing judgment creditors. *Id.*

JUDGMENTS OF SISTER STATES.

1. A judgment obtained in a sister state upon notice to the defendant by publication only, there being no appearance of the defendant, will be deemed null and void outside the state in which it is rendered. *Winston v. Taylor*, 82.
2. A. and B. gave to C. their joint promissory note dated and payable at the city of New York. By the law of the state of New York at the date of the note, upon the recovery of a judgment against one of two

JUDGMENTS OF SISTER STATES—(Continued.)

joint debtors there was a merger of the debt and no action could afterwards be maintained against the other joint debtors. C. instituted suit upon said promissory note in the state of Louisiana against A. alone, and recovered judgment. *Held*, that this judgment against A. was no bar to an action on the note against B. alone in the courts of this state. *Wiley v. Holmes*, 283.

JURISDICTION.

See JUSTICES' COURTS.

1. The Kansas city court of common pleas has no jurisdiction of actions to enforce mechanics' liens. *Ashburn v. Ayres*, 75; *Platt v. Smith*, 593.
2. Each court may control the execution of its own process. Should a court, in a suit for partition, order a sale of land situate in a county other than that in which the suit is pending, it may entertain a motion to set such sale aside on the ground of fraud on the part of the purchaser. *Kyte v. Plemmons*, 104.
3. Should, however, an original action be instituted to set aside such sale, it must be brought in the county in which the land is situated. *Id.*
4. The charter of the St. Louis and Iron Mountain Railroad Company did not confer upon a justice of the peace jurisdiction of an action against the company to recover damages for injuries sustained by reason of the construction of a culvert. *Fatchell v. St. Louis and Iron Mountain Railroad Co.*, 178.
5. The St. Louis law commissioner's court has jurisdiction of an action for the possession of specific personal property in which the value of the property claimed is alleged to be one hundred and fifty dollars and the damages claimed for the detention are fifty dollars; it is the value of the property claimed that determines the jurisdiction. *Annis v. Bigney*, 247.
6. Where in an action for partition a sale is made by the sheriff under the order of the court, the court may, at any time during the term to which the process issued to the sheriff is returnable, set aside such sale without notice to the purchasers thereat; the court has power to control the execution of its own process, and it is not essential to the exercise of this power that the purchasers should be notified. *Neiman v. Early*, 475.
7. The mayor of the city of Boonville has jurisdiction over all cases arising under the charter and the ordinances of said city, although they should involve the assessment of a fine or penalty exceeding ninety dollars. *Willis v. City of Boonville*, 543.
8. Justices of the peace have jurisdiction of actions brought against railroad corporations under the twelfth section of the general railroad act. (R. C. 1855, p. 414.) *Mooney v. Hannibal & St. Joseph Railroad Co.*, 570.
9. The Kansas city court of common pleas, established by the act of the general assembly approved November 20, 1855, (Sess. Acts, 1855, Adj. Sess. p. 60) does not possess probate jurisdiction. *Burke's Adm'r v. Walrond*, 591.

JUROR.

1. A. was indicted for stealing certain cattle alleged in the indictment to be the property of B. At the trial, one C., who had been summoned as a juror, stated, upon his *voir dire*, that he knew the cattle alleged to have been stolen; that his brother had once owned them, and had sold them to one K., who had sold them to B. *Held*—the allegation as to B.'s ownership not being controverted on the trial—that C. was a competent juror. *State v. Martin*, 530.

JUSTICES' COURTS.

See COUNTY COURTS.

1. The charter of the St. Louis and Iron Mountain Railroad Company did not confer upon a justice of the peace jurisdiction of an action against the company to recover damages for injuries sustained by reason of the construction of a culvert. *Fatchel v. St. Louis & Iron Mountain Railroad Co.*, 178.
2. In summary proceedings under the landlord and tenant act of November 29, 1855, the summons issued by the justice and directed to the tenant must be executed at least five days before the return day thereof. (R. C. 1855, p. 1017, § 34.) *Hunt v. Cobb*, 198.
3. Should a justice of the peace in such a summary proceeding, in which less than five days' service of the summons has been had before the return day of the writ, render judgment of default against the defendant, and he should appeal, and should fail to prosecute his appeal with effect, the appellee would not be entitled to have the judgment affirmed by the appellate court upon his filing a transcript of the proceedings of the justice. (Scott, Judge, dissenting.) *Id.*
4. A justice of the peace rendered a judgment by default against a defendant, and allowed an appeal although the defendant made no motion to set the default aside, and the justice filed a transcript of his proceedings before the proper appellate tribunal. Afterwards, and within the time allowed by law, the defendant moved the justice to set aside the judgment by default; this motion the justice refused to entertain, as also a further application for an appeal. *Held*, that the defendant was entitled under these circumstances to have the cause tried upon the merits in the appellate court. *Dermody v. Steamboat Maria Denning*, 284; *Grant v. Same*, 284.
5. After a defendant in an action before a justice of the peace appears and consents to a continuance, it is too late to object to the jurisdiction of the justice on the ground that the defendant does not reside in the township in which the suit is brought. *Bohn v. Devlin*, 319.
6. Justices of the peace can not specifically enforce a parol contract concerning land on the ground that it has been taken out of the statute of frauds by part performance. *Ridgley v. Stillwell*, 400.
7. A. let certain premises to B. for a term of years; the letting, being by parol, had the force and effect at law of a tenancy from year to year. A. gave B. due notice to quit, and brought his action of forcible detainer before a justice of the peace. B. relied for a defence upon the

JUSTICES' COURTS—(Continued.)

fact that he had entered upon said premises under a parol lease for ten years, while the building thereon was not completed, and had made improvements thereon, and had paid rent under said parol agreement. *Held*, that the justice of the peace had no jurisdiction to enforce the equities arising out of such a defence, and that, if the defendant was entitled to the specific enforcement of the parol agreement, he might have enjoined in a court of competent jurisdiction the proceedings before the justice until his equity could be determined. *Id.*

8. A justice of the peace can not take the acknowledgment of a married woman of a deed conveying her real estate; the acknowledgment must be taken by some court having a seal, or some judge, justice or clerk thereof. *West v. Best*, 551.
9. Justices of the peace have jurisdiction of actions brought against railroad corporations under the twelfth section of the general railroad act. (R. C. 1855, p. 414,) *Mooney v. Hannibal & St. Joseph Railroad Co.*, 570.

K

KANSAS CITY COURT OF COMMON PLEAS.

1. The Kansas city court of common pleas has no jurisdiction of actions to enforce mechanics' liens. *Ashburn v. Ayres*, 75; *Platt v. Smith*, 593.
2. The Kansas city court of common pleas, established by the act of the general assembly approved November 20, 1855, (Sess. Acts, 1855, Adj. Sess. p. 60,) does not possess probate jurisdiction. *Burke's Adm'rx v. Walrond*, 591.

L

LANDLORD AND TENANT.

1. Where a tenant, after the termination of the time for which the premises are demised to him, willfully holds over, no demand in writing is necessary to enable the landlord to maintain an action for unlawful detainer against him. *Young v. Smith*, 65.
2. Where the term of a tenant is to end at a time certain, no notice to quit is necessary, whether the term is for less or more than a year. *Id.*
3. By the general law, if a tenant make erections and improvements upon the leased land and so connect the same with buildings already erected that they can not be separated or removed without material injury to the landlord's property, such erections or structures will be deemed in law fixtures as against such tenant, and he can not remove the same. *Powell v. McAshan*, 70.
4. An agreement on the part of the landlord, that the tenant may take off and carry away any and all buildings, sheds and other temporary houses and improvements he may erect, would not be construed to

LANDLORD AND TENANT—(Continued.)

- authorize the taking away of erections, the removal of which would cause material injury to the property of the landlord. *Id.*
5. Such an agreement on the part of the landlord would be valid although oral; it would not be within the statute of frauds. *Id.*
 6. In summary proceedings under the landlord and tenant act of November 29, 1855, the summons issued by the justice and directed to the tenant must be executed at least five days before the return day thereof. (R. C. 1855, p. 1017, § 34.) *Hunt v. Cobb*, 198.
 7. Should a justice of the peace in such a summary proceeding, in which less than five days' service of the summons has been had before the return day of the writ, render judgment of default against the defendant, and he should appeal, and should fail to prosecute his appeal with effect, the appellee would not be entitled to have the judgment affirmed by the appellate court upon his filing a transcript of the proceedings of the justice. (Scott, Judge, dissenting.) *Id.*
 8. The word "lease" as an operative word in an instrument of lease imports and contains a covenant for quiet enjoyment as well as the words "grant and demise." (Scott, J., dissenting.) *Hamilton v. Wright's Adm'r*, 199.
 9. Such implied covenant runs with the land. *Id.*
 10. A., a tenant for life only of certain real estate but possessed of a full power to dispose thereof by appointment by will, leased the same to B. for a term of ten years. A. died before the expiration of said term without having attempted to protect the tenant by exercising the power of appointment, and the tenant was evicted by the remainder man. Held, that B. might maintain an action against A.'s administrator to recover damages for a breach of the covenant implied from the word "lease" in the instrument of lease. *Id.*
 11. A parol lease for a term of years has the force and effect of a tenancy from year to year. *Ridgley v. Stillwell*, 400.
 12. A covenant for perpetual renewal of a lease is valid. *Blackmore v. Boardman*, 420.
 13. A covenant for renewal of a lease is an incident to the lease and will pass by an assignment of the unexpired term; a sale by the sheriff under an execution of the interest of the lessee in the land will pass to the purchaser the covenant for renewal. *Id.*
 14. In an action of ejectment for the recovery of leasehold premises, the plaintiff can not recover by way of damages the rents and profits beyond the time of the expiration of his title. *Gutzweiler v. Lachman*, 434.

LANDS AND LAND TITLES.

See CONVEYANCE. EJECTMENT.

1. Whatever may be the nature of the title acquired by the state of Missouri by virtue of the act of Congress of June 10, 1852, granting lands in aid of the construction of certain railroads—whether the state acquired the fee simple title to the lands clothed with a political trust for the execution of which the faith of the state was pledged by the acceptance of the grant, or whether the act of Congress created an estate upon

LANDS AND LAND TITLES—(Continued.)

- condition subsequent—a mere trespasser can not defend against a grantee of the state by invoking a supposed right of the United States to enter for condition broken. *Kennett v. Plummer*, 142.
2. Under the act of incorporation of March 1, 1851, (Sess. Acts, 1851, p. 139,) the city of Carondelet had power to sell and dispose of its school lands; the purchaser was under no obligation to see to the application of the purchase money. She might convey a portion of her school lands in exchange for and by way of compromise of an adverse claim to land embraced within her survey of common. Third persons could not dispute the validity of such an exchange on the ground that Carondelet had thereby committed a breach of its obligation to appropriate the school lands and their proceeds to the use of schools. *Bowlin v. Furman*, 427.
 3. A conveyance by Carondelet by quit-claim deed of a portion of its school lands is valid and operative although at the date thereof there was no survey or assignment by the United States for the use of schools; to sustain a conveyance made before such assignment it is not necessary to invoke the doctrine of the enurement of after-acquired titles. *Id.*
 4. Hunt, United States recorder of land titles, upon proof of inhabitation, cultivation and possession made before him under the act of Congress of May 26, 1824, issued a certificate of confirmation to one *Louis Lacroix*. *Held*, that the title thus evidenced would not be made to enure to one *Joseph Lacroix* or his legal representatives by showing that it was said *Joseph* and not *Louis* that appeared before the recorder and made proof under the act of May 26, 1824, and that the certificate was issued by mistake to *Louis* instead of *Joseph Lacroix*. *Williams v. Carpenter*, 453.
 5. Hunt's minutes of testimony taken by the act of Congress of May 26, 1824, are not admissible in evidence except to prove such facts as may be proved by hearsay. If professedly admitted to prove such facts, care should be taken that they are not used for other and illegal purposes. *Williams v. Carpenter*, 453.
 6. Where a common field lot confirmed by the second section of the act of Congress of April 29, 1816, has a definite and certain location, the statute of limitations will run in favor of an adverse possession prior to an approved survey by the United States. (*Aubuchon v. Ames*, 27 Mo. 87, affirmed.) *St. Louis University v. McCune*, 481.
 7. On the third of October, 1807, one A. gave to the United States recorder of land titles a notice in writing to the effect that he claimed, as assignee of B., six hundred and thirty-nine acres of land situate at Mine à Breton, by virtue of "inhabitation and cultivation" thereof by said B. This claim was presented to the board of commissioners in 1807, but was not then acted upon. In 1811, the claim was again presented to the board and was rejected on the ground that B. claimed another tract of land by concession. In 1820 notice of the claim was filed in the land office at Jackson, Mo., and the land was marked out

LANDS AND LAND TITLES—(*Continued.*)

as reserved from sale on the plat on file in said office by red dotted lines. In 1825, Recorder Hunt, upon proof made before him by C. and D., who were the legal representatives of A. and B. as respected the whole tract claimed at Mine à Breton, issued certificates of confirmation to said C. and D. for two lots—one a village lot in Mine à Breton, and the other an outlot of said village containing about fourteen arpens. Both these lots were embraced in the tract of six hundred and thirty-nine acres as claimed before the recorder by A. On the 3d of December, 1833, C., who had acquired the interest of D., submitted said claim for the said tract to the board of commissioners organized under the act of Congress of July 9, 1832, and adduced testimony in its support. The board took no action thereon. On the 7th of August, 1834, C., in consideration of the privilege of preëmption granted by the third section of the act of Congress of July 9, 1832, taken in connection with the supplementary act of March 2, 1833, waived and relinquished to the United States, by deed duly executed, all claim whatever to said tract of six hundred and thirty-nine acres. The description in this deed of waiver and relinquishment embraced the whole tract including the village lot and outlot covered by Hunt's certificates. At the date of this deed of relinquishment and waiver, C. resided upon the village lot and cultivated the outlot for which Hunt's certificate had been issued in 1825, but no portion of his improvements extended beyond the boundaries of these lots, except a part of a field, which did extend beyond the lines of said outlot as afterwards surveyed by United States. After his said relinquishment and waiver and about the 1st of September, 1834, C. made application to the register of the land office at Jackson, Mo., to enter said tract as a preëmtor under the third section of the act of Congress of July 9, 1832. He was not then permitted to make the entry because the public surveys were not then completed. Afterwards, on the 26th of November, 1839, C. was permitted to and did enter, as preëmtor under said act of Congress of July 9, 1832, in conformity with the township and section lines, and their interferences with said tract so relinquished to the United States, various portions thereof, among others a fractional half quarter section in fractional section fifteen, township thirty-seven north, range two east. In 1843, this entry was cancelled by order of the commissioner of the general land office, concurred in by the secretary of the treasury, on the ground that the third section of the act of July 9, 1832, gave the right of preëmption to none but actual settlers and housekeepers on the land sought to be entered; that C. did not bring himself within the provisions of said section, his residence on the village lot and his actual possession and cultivation of the outlot not constituting him an actual settler and housekeeper as to the whole tract claimed. Afterwards, in 1847, one E. entered said land as a preëmtor, and in 1854 obtained a patent therefor from the United States. *Held*, in a suit for possession by E. against C., that the claim of C., as the legal representative of B., to the tract of six hundred and thirty-nine acres was a claim within the meaning of the act of Congress of March 2, 1833; that C. was en-

LANDS AND LAND TITLES—(Continued.)

- titled, under the third section of the act of Congress of July 9, 1832, to relinquish or waive said claim in favor of the United States; that, having made such a waiver or relinquishment, C. had a right, under said third section, to enter said tract as a preëmtor irrespective of the question whether he was an actual settler and housekeeper thereon or not; that the act of the executive officers of the United States in cancelling and annulling C.'s entry was void; that his entry, notwithstanding such cancellation, was valid and binding upon the United States and all persons claiming under the United States by title subsequent, whether by patent or otherwise. *O'Brien v. Perry*, 500.
8. The survey of the outboundary line of the town of St. Louis—the plat of which is commonly known as “Map X”—is not conclusive upon persons claiming title under confirmations by virtue of the first section of the act of Congress of June 13, 1812; said act is operative to confirm to individuals common field lots and out-lots as well without as within said outboundary line as established by said survey. *Milburn v. Hardy*, 514; *Milburn v. Hortiz*, 523.
9. The certificates of confirmation issued by Recorder Hunt under the act of Congress of May 26, 1824, are *prima facie* evidence of title by virtue of the act of Congress of June 13, 1812, as against persons claiming by title emanating from the United States in the year 1820. *Milburn v. Hardy*, 514.
10. So also surveys by the United States of the lots embraced in the certificates issued by Recorder Hunt under said act of May 26, 1824, are admissible in evidence as against persons claiming by titles acquired from the United States prior to the passage of said act of May 26, 1824. *Id.*
11. The corners established by the United States surveyors in surveying the public lands are conclusive as to the actual location of the boundary lines of sections and such subdivisions thereof as are authorized by the laws of the United States; it can not be shown that the United States surveyors mistakenly located such corners. *Climer v. Wallace*, 556.

LAW COMMISSIONER'S COURT.

See JURISDICTION.

LEASE.

See LANDLORD AND TENANT. COVENANT.

LEVY.

See ATTACHMENT. EXECUTION. SHERIFF. CLAIM AND DELIVERY OF PERSONAL PROPERTY.

LIEN.

See MECHANICS' LIEN. BOATS.

LIMITATION.

1. Where a common field lot confirmed by the second section of the act of

LIMITATION—(*Continued.*)

- Congress of April 29, 1816, has a definite and certain location, the statute of limitations will run in favor of an adverse possession prior to an approved survey by the United States. (*Aubuchon v. Ames*, 27 Mo. p. 87, affirmed.) *St. Louis University v. McCune*, 481.
2. Where a proprietor of land, through mistake or ignorance of the true location of the line separating his tract from that of an adjoining proprietor and with no intention to claim beyond the true line of separation, extends his fence beyond such line and encloses a portion of the land of such adjoining proprietor, the possession thus acquired will not be adverse. *Id.*

LIST OF TAXABLE PROPERTY.

1. In an indictment founded on the fifteenth section of the second article of the revenue act of 1857, (Sess. Acts, 1857, Adj. Sess. p. 79,) for delivering to the assessor a false and fraudulent list of taxable property, it must appear in what respect the list delivered is false and fraudulent; the indictment must set out, in terms of general description at least, the taxable property owned by the defendant and fraudulently omitted in the list delivered. *State v. Welch*, 600.

LOST GOODS.

See CRIMES AND PUNISHMENTS.

M

MANDAMUS.

1. Where an inferior judicial tribunal declines to hear a cause upon what is termed a preliminary objection—as where, in a statutory proceeding instituted to contest the election of a sheriff, the court refuses to try the cause upon the merits but dismisses the same and quashes the proceedings on the ground that the contestant had not given the notice required by the statute—a mandamus will lie from the supreme court commanding the inferior court to reinstate the cause upon its docket and proceed to try the same, if such court had misconstrued the law in such preliminary matter. (SCOTT, Judge, dissenting.) *Castello v. St. Louis Circuit Court*, 259.

MARRIED WOMEN.

See CONVEYANCE. DIVORCE. DOWER.

MASTER.

See BOATS AND VESSELS.

MAYOR.

See BOONVILLE.

MECHANICS' LIEN.

1. The Kansas city court of common pleas has no jurisdiction of actions to enforce mechanics' liens. *Ashburn v. Ayres*, 75; *Platt v. Smith*, 593.
2. Where a material man institutes proceedings to enforce a lien against the contractor and the owner of the building, and dismisses the same

MECHANICS' LIEN—(Continued.)

- as to the original debtor, the contractor, the proceeding must also be dismissed as to the owner of the building, there being no party on the record to defend the suit. *Id.*
3. Public bridges are not subjected by the St. Louis mechanics' lien act of February 14, 1857, (Sess. Acts, 1857, p. 668,) to liens for work done thereon or for materials furnished for their construction. *McPheeters v. Merimac Bridge Co.*, 465.
 4. The bridge authorized to be built by the act of February 24, 1853, incorporating the Merimac Bridge Company, (Sess. Acts, 1853, p. 195,) was a public bridge. *Id.*

MERCHANTS' LICENSES.

1. A druggist who, in good faith, sells intoxicating liquor, whisky, for medical purposes, can not be rendered liable to an indictment for selling liquor in a less quantity than a gallon; he is not required to institute a strict inquisition into the motives and objects of the persons dealing with him. *State v. Mitchell*, 562.
2. A dealer in drugs and medicines is a merchant within the meaning of the first section of the act to tax and license merchants. (R. C. 1855, p. 1072.) *State v. Wells*, 565.
3. To constitute a merchant a dealer in drugs and medicines within the meaning of the twenty-second section of the act to tax and license merchants (R. C. 1855, p. 1077) so as to authorize him, under his license as a merchant, to sell spirituous liquors in any quantity when it is used only for medical purposes, it is necessary that he should be engaged principally in selling drugs and medicines, though he may incidentally admit into his store and may vend articles not strictly falling under the denomination of drugs and medicines. *State v. Wells*, 565.
4. The act regulating dram-shops, approved December 13, 1855, (R. C. 1855, p. 683) and the act to tax and license merchants, approved December 11, 1855 (R. C. 1855, p. 1077, § 22,) did not affect the validity of an unexpired grocer's license granted previous to May 1, 1856. *State v. Andrews*, 14.
5. The revised code of 1855 repealed the third section of the act of March 25, 1845, (R. C. 1845, p. 542); consequently a grocer, under an unexpired license granted previous to May 1, 1856, might permit intoxicating liquor sold by him after May 1, 1856, to be drank at a place under his control. *Id.*

MERIMAC BRIDGE.

See MECHANICS' LIEN.

MILLS AND MILL-DAMS.

1. The court ought not, in proceedings instituted under the act concerning mills and mill-dams, to give permission to erect, or increase the altitude of, a dam, if it appear that the mansion-house of any proprietor or other out-houses, curtilages or gardens thereto belonging, or orchard, will be overflowed, or that the health of the neighborhood will be materially affected. *Willoughby v. Shipman*, 50.

MILLS AND MILL-DAMS—(*Continued.*)

2. A spring-house is an out-house within the meaning of the eighteenth section of said act. *Id.*

MINORS.

See REVENUE.

MORTGAGE.

See ATTACHMENT, 6.

1. Until entry by a mortgagee for condition broken, or until foreclosure, the mortgagor is the owner of the mortgaged estate and may lease the same, or otherwise deal with it as owner. *Kennett v. Plummer*, 142.

MULTIFARIOUSNESS.

See PLEADING.

N

NEGLIGENCE.

See CARE. RAILROADS.

NOTICE.

See DEPOSITIONS. CONVEYANCE.

P

PARTIES.

See PLEADING.

PARTITION.

1. Should a testator, by reason of a failure to name or provide for some of his children in his will, be deemed in law to have died intestate as to those not named, they can not maintain against the devisees an action for the partition of the property embraced in the devise; resort must be had to a petition for contribution, in which the equities arising out of advancements may be adjusted. *Hill v. Martin*, 78.
2. Each court may control the execution of its own process. Should a court, in a suit for partition, order a sale of land situate in a county other than that in which the suit is pending, it may entertain a motion to set such sale aside on the ground of fraud on the part of the purchaser. *Kyte v. Plemmons*, 104.
3. Should, however, an original action be instituted to set aside such sale, it must be brought in the county in which the land is situated. *Id.*
4. Suits for partition may be maintained in behalf of those having equitable titles only. *Welch v. Anderson*, 293.
5. Infants may be plaintiffs in statutory proceedings for partition. *Waugh v. Blumenthal*, 462.
6. The act of February 21, 1845, (R. C. 1845, p. 764,) providing for the partition of land, &c., authorized the joinder of all the parties in inter-

PARTITION—(*Continued.*)

- est as parties plaintiff in a statutory proceeding for partition. (*Bompart v. Roderman*, 24 Mo. 385, overruled.) *Id.*
7. Where in a partition suit a sale of the premises is ordered, and previous to the sale it is agreed between certain parties in interest that one of their number shall bid off the property at such sale unless it brings a certain price, and hold it for the benefit of the parties to the agreement and such others of those interested as may choose to become parties thereto, and that the others shall abstain from bidding at such sale, and he does purchase the property under such agreement; *held*, that he will hold it in trust for all the parties in interest. *Northercraft v. Martin*, 469.
 8. Where in an action for partition a sale is made by the sheriff under the order of the court, the court may, at any time during the term to which the process issued to the sheriff is returnable, set aside such sale without notice to the purchasers thereat; the court has power to control the execution of its own process, and it is not essential to the exercise of this power that the purchasers should be notified. *Neiman v. Early*, 475.

PARTNERSHIP.

1. Where property is bailed to a partnership, one partner can not absolve himself from liability to a bailor, without the latter's consent, by retiring from the firm. Where, however, property is not bailed for any definite time, but the bailor may take the same away at any time, a retiring partner may give notice to the bailor of his retiring and may require him to take away the bailed property; if the bailor should then permit it to remain after the expiration of a reasonable time, he must look to the remaining partners; the retiring partner would be absolved from liability for loss occurring after his retirement. *Winston v. Taylor*, 82.
2. A person can not give himself credit as the partner of another by holding himself out to the world as such without the consent, express or implied, of such other person. *Crook v. Davis*, 94.
3. Upon the dissolution of a partnership by the death of a partner, the surviving partner may proceed to wind up and settle the affairs of the partnership without giving bond as required by the fifth section of the first article of the act respecting executors and administrators; he may transfer a promissory note held by the partnership in payment of a partnership debt or liability. *Bredow v. Mutual Savings Institution*, 181.
4. Should the surviving partner fail, within the time limited, to give bond as required by the fifty-fifth section of the first article of the administration act, he is liable to be ousted from possession of the partnership effects, and divested of the right to administer on the same, by the executor or administrator of the deceased partner, if the latter should give bond as required by the fifty-ninth section of the first article of said act. *Id.*
5. Where a lease is made to five persons, and there is nothing on the face of the lease to indicate that the lease was made to them for partnership purposes, and under a judgment against one of them his interest

PARTNERSHIP—(*Continued.*)

in the lease is levied on and sold, and the purchaser institutes an action for partition of the leasehold premises; *held*, that, at law, the lessees held the premises as tenants in common and the purchaser at the execution sale acquired the apparent interest of the execution debtor; that the defendants could not show, by way of equitable defence to the partition suit, that the said leasehold premises were purchased and held for partnership purposes and were consequently personalty, and that the execution debtor had no interest therein, unless they set up such a defence in their answer; that if such defence were set up, notice must be brought home to the purchaser. *Cowden v. Cairns*, 471.

PATENT RIGHT.

See EVIDENCE, 31.

1. To render an assignment of a patent right or of an undivided part thereof valid, it is not necessary that it should be recorded in the United States patent office; the assignee will have a vendible interest without such record. *Sone v. Palmer*, 539.

PENALTY.

See DAMAGES.

PHELPS COUNTY.

See SEATS OF JUSTICE.

PLEADING.

See SLANDER. EQUITY, 2. PARTITION, 5, 6. PRACTICE, 34, 35. PARTNERSHIP, 5.

1. In every answer, amendatory or supplemental, the defendant must set forth, in one entire pleading, all matters which by the rules of pleading may be set forth therein, and which may be necessary to the proper determination of the defence. (R. C. 1855, p. —, § 13.) The courts can not permit parties to dispense by agreement with the statutory provision bearing on this subject; as by agreeing that the original and amended answers shall be considered as one. *Basye v. Ambrose*, 39.
2. A defendant can not be permitted to introduce evidence to support a defence to the action not set up in his answer. *Winston v. Taylor*, 82; *Cowden v. Cairns*, 471.
3. It is not necessary in pleading to allege that a guaranty relied on is in writing. *Miles v. Jones*, 87.
4. A. and B. combining, by threats of violence against C., extorted from the latter the transfer to themselves of a certain tract of land owned by the latter—one portion thereof being conveyed to A., and the other to B.—A. conveyed his portion to D., who took with notice. C. instituted an action against A., B. and D. to obtain an annulment of said deeds. *Held*, that the petition was not multifarious. *Bray v. Thatcher*, 129.
5. In a suit to recover damages for the breach of a written contract entered into with two persons, both must join as parties plaintiff. The fifth section of the second article of the practice act is inapplicable to such a case. (R. C. 1855, p. 1218.) *Ranney v. Smizer*, 310.

PLEADING—(Continued.)

6. The objection that a petition does not state facts constituting a cause of action is not waived by a failure to take the same by demurrer; the defendant may make the same by motion for new trial, or may at the trial oppose on this ground the introduction of evidence on the part of the plaintiff. *Syme v. Steamboat Indiana*, 335.
7. A defendant will not be permitted at the trial of a cause to amend by denying facts admitted in his answer. *Harrison's Adm'r v. Hastings*, 346.
8. A defendant should not be permitted to introduce evidence to support a defence not set up in his answer. *Lynch v. Morrow's Adm'r*, 357.
9. A petition is not demurrable because a judgment is asked not warranted by the averments; the court may grant any relief consistent with the case made and the allegations of the petition. *Norcraft v. Martin*, 469.
10. A defendant can not introduce evidence to support a defence not set up in his answer. If the evidence discloses a defence not set up in the answer, the court may, in furtherance of justice and on such terms as may be fit, allow the defendant to amend his pleading so as to make it conform to the facts in proof, provided the amendment does not substantially change the defence. *Irwin v. Chiles*, 576.
11. Should a testator, by reason of a failure to name or provide for some of his children in his will, be deemed in law to have died intestate as to those not named, they can not maintain against the devisees an action for the partition of the property embraced in the devise; resort must be had to a petition for contribution, in which the equities arising out of advancements may be adjusted. *Hill v. Martin*, 78.
12. A person to whom a negotiable promissory note has been endorsed may maintain an action thereon in his own name, although it was endorsed to him merely for collection. In a suit on such a note by an endorsee the caption of the petition was as follows: "A., to the use of B., plaintiff, v. C., defendant." In the body of the petition the plaintiff alleged title in himself by endorsement from B. Held, that the words in the caption "to the use of B." might be regarded as mere surplusage. *Beattie v. Lett*, 596.

POLICY.

See INSURANCE.

PRACTICE.

See ROADS AND HIGHWAYS, 1. SECURITY FOR COSTS. DAMAGES, 3, 4, 5. TRESPASS. EXECUTION. WILLS AND TESTAMENTS. ELECTION. JUSTICES' COURTS.

1. Where no cause of action is stated in a petition, the defect will not be cured by verdict; the objection may be taken by motion in arrest of judgment. *Welch v. Bryan*, 30.
2. A verified statement upon which a confession of judgment is rendered must state concisely the facts out of which the indebtedness arose. If it state the execution of a promissory note to the plaintiff; that "said note was given for goods, wares and merchandise sold by the plaintiff

PRACTICE—(Continued.)

- to the defendant before the date thereof," it will be materially defective. *Bryan v. Miller*, 32.
3. A judgment rendered upon such a statement, though not valid as to other judgment creditors, would be valid between the parties thereto. The defective statement might be amended, but not so as to affect rights of existing judgment creditors. *Id.*
 4. When the defendant in an execution is not a resident of the county in which the land sought to be sold is situated, the plaintiff in the execution should give notice to the defendant of the issuing of the same as required by section 46 of the act regulating executions. (R. C. 1855, p. 766, § 46.) Should no such notice be given, and property be levied on and sold under the execution, the defendant may on the return day of the execution move the court to set aside such sale, and the court should set aside the same although the sheriff may have executed the deed to the purchaser before the return day of the execution. *Ray v. Stobbs*, 35.
 5. Parties aggrieved by the location of a state road have a right of appeal to the circuit court. Since, however, there is no provision authorizing the signing of bills of exceptions in such cases, the circuit court must affirm or reverse on the record alone. *Bernard v. Callaway County Court*, 37.
 6. In every answer, amendatory or supplemental, the defendant must set forth, in one entire pleading, all matters which by the rules of pleading may be set forth therein, and which may be necessary to the proper determination of the defence. (R. C. 1855, p. —, § 13.) The courts can not permit parties to dispose by agreement with the statutory provision bearing on this subject; as by agreeing that the original and amended answers shall be considered as one. *Basye v. Ambrose*, 39.
 7. Where the plaintiff in a suit gives security for costs and the defendant prevails in the action, judgment may be rendered at the same time against the surety; should however judgment for costs against the surety be omitted, the defendant may sue the surety directly on his undertaking. *Davis v. Farmer*, 54.
 8. A defendant can not be permitted to introduce evidence to support a defence to the action not set up in his answer. *Winston v. Taylor*, 82; *Cowden v. Cairns*, 471.
 9. A judgment obtained in a sister state upon notice to the defendant by publication only, there being no appearance of the defendant, will be deemed null and void outside the state in which it is rendered. *Winston v. Taylor*, 82.
 10. Each court may control the execution of its own process. Should a court, in a suit for partition, order a sale of land situate in a county other than that in which the suit is pending, it may entertain a motion to set such sale aside on the ground of fraud on the part of the purchaser. *Keyte v. Plemmons*, 104.
 11. Should, however, an original action be instituted to set aside such sale, it must be brought in the county in which the land is situated. *Id.*
 12. Where a cause is properly triable by the court, the parties are not en-

PRACTICE—(Continued.)

- titled as a matter of course to have issues framed and submitted to a jury. The cases in which it is peculiarly appropriate to direct issues to be submitted to and tried by a jury are those in which single material facts are disputed and the evidence is conflicting. *Morris v. Morris*, 114.
13. Issues submitted to a jury should be framed in language plain and perspicuous. *Id.*
 14. Instructions given to a jury should contain no comments on the evidence. *Id.*
 15. Granting that an appeal would lie from the judgment of a county court in a proceeding instituted to obtain a removal of the seat of justice, it would only lie in the case of a final judgment. *Wood v. Phelps County Court*, 119.
 16. Neither under the general act regulating the removal of seats of justice (R. C. 1855, p. 513), nor under the act organizing Phelps county (Sess. Acts, 1857, Adj. Sess. p. 397) would an appeal lie to the circuit court from an order of the county court sustaining or overruling a motion to set aside or vacate a former order of the county court approving the location of the seat of justice. *Id.*
 17. Where a plaintiff seeks relief other than the recovery of money only or of specific real or personal property—as where the annulment of deeds is sought on the ground that they were obtained by duress and violence—the cause must be tried by the court and not by the jury. *Bray v. Thatcher*, 129.
 18. Where a suit results adversely to the plaintiff and he becomes liable for costs and judgment is rendered accordingly, it is no error as against him that judgment for costs is also rendered against another irregularly made a party to the suit at the instance of the defendant. *Dickerson v. Chrisman*, 134.
 19. Where a deposition is offered in evidence, and its admission is objected to for various reasons, if the objection that the absence of the witness has not been accounted for be not made, it will be deemed to have been waived. *Id.*
 20. The rule that a judgment is an entire thing, and if reversed as to one must be reversed as to all, is only applicable to judgments at law. *Id.*
 21. The supreme court will not grant new trials on the ground that verdicts are against the weight of evidence; it is the province of the jury to attach such credit to the testimony of witnesses as they may think it entitled to. *Steamboat City of Memphis v. Matthews*, 248.
 22. When the record proper of a cause shows that a demurrer to a petition has been regularly heard, considered and overruled, the objection will not be entertained in the supreme court that the court overruled the demurrer without hearing counsel. *The State, to use, &c., v. Sanger*, 314.
 23. After a defendant in an action before a justice of the peace appears and consents to a continuance, it is too late to object to the jurisdiction of the justice on the ground that the defendant does not reside in the township in which the suit is brought. *Bohn v. Devlin*, 319.

PRACTICE—(Continued.)

24. A notice to take depositions that is unsigned is insufficient; depositions taken upon such a notice, the opposite party not attending, either in person or by attorney, at the time and place specified in the notice, may be suppressed. *Id.*
25. The issues of fact in an action brought to obtain the surrender and cancellation of a promissory note must be tried by the court, unless the court takes the opinion of a jury upon some specific question of fact involved therein, by an issue made up for that purpose. (R. C. 1855, p. 1261, § 13.) *Conran v. Sellew*, 320.
26. Where the trial must be by the court, instructions or declarations of law in the form of instructions are not required, and if given will not be reviewed or noticed by the supreme court. *Id.*
27. When either party to a cause offers to read a deposition taken therein, he must read the whole of it, except such portions, if any, as are ruled out by the court as inadmissible. *Hill v. Sturgeon & Rawlings*, 323.
28. The objection that a petition does not state facts constituting a cause of action is not waived by a failure to take the same by demurrer; the defendant may make the same by motion for new trial, or may at the trial oppose on this ground the introduction of evidence on the part of the plaintiff. *Syme v. Steamboat Indiana*, 335.
29. Where an application is made for a continuance on the ground of the absence of a material witness, it must appear from the accompanying affidavit that the applicant had used due diligence to procure the testimony of such absentee. *Cline & Jamison v. Brainard*, 341.
30. A defendant will not be permitted at the trial of a cause to amend by denying facts admitted in his answer. *Harrison's Adm'r v. Hastings*, 346.
31. Should the objection be taken, at the trial of an issue raised by an interplea in an attachment, that the interpleader only claims the attached property as *cestui que trust*, he should be permitted to substitute his trustee as plaintiff in the interplea. *Winkelmaier v. Weaver*, 358.
32. A party can not assign for error that which is beneficial to himself and prejudicial to the opposite party alone. *Hohenthal v. Watson*, 360.
33. Where, in an action for the possession of personal property, the plaintiff gives bond and receives possession of the property, and the cause is tried by a jury, the jury, regularly, in case of finding for the defendant, should assess the *value* of the property, as also the damages. *Id.*
34. It is the province of the jury to determine questions of fact at issue in a cause; the court should not direct them to draw inferences that are not legal inferences. *Moies v. Eddy*, 382.
35. A. filed a bill in chancery against B. for a general account of a partnership. B., in his answer, set up as a defence that an account of the affairs of the partnership had been stated and settled. Upon a hearing, there was an interlocutory decree finding a settlement as stated in the answer. An amended bill being filed and leave given to either party to surcharge and falsify the account stated, said account was referred to a commissioner "with instructions to examine the same as to errors and omissions on the footing of said account stated, and to state a bal-

PRACTICE—(Continued.)

- ance of account and interest due to either party, from the pleadings and evidence now in this cause, and such further competent evidence as either party may produce before him in conformity to this decree." *Held*, that, under this order of reference, the examination before the commissioner was confined to such errors and omissions as were specifically charged in the pleadings and sought therein to be surcharged and falsified. *Boyle v. Hardy*, 390.
36. Though all the evidence already in the cause was before the commissioner by virtue of the order of reference, yet balance sheets made out to supply the loss of others that had been in evidence before a former commissioner would not be admissible unless supported by proper testimony. *Id.*
37. Although a witness, a surveyor, should be improperly permitted to give his opinion upon a matter of law, as to declare what are the controlling calls of a deed, a judgment will not be reversed for this impropriety, if the opinion given be substantially correct and such as can not have prejudiced the party complaining of it. *Whittelsey v. Kellogg*, 404.
38. If the plaintiff in an action of ejectment fail at the trial to establish his right to a recovery upon the title relied on by him, he may resort to another title; it is improper to require him to elect one of two titles, upon which he announces his purpose to rely, as that upon which he must base his right to a recovery, even though such titles be inconsistent with each other. *St. Louis Public Schools v. Risley*, 415.
39. Where in an action for partition a sale is made by the sheriff under the order of the court, the court may, at any time during the term to which the process issued to the sheriff is returnable, set aside such sale without notice to the purchasers thereat; the court has power to control the execution of its own process, and it is not essential to the exercise of this power that the purchasers should be notified. *Neiman v. Early*, 475.
40. Since the enactment of the practice act of 1849, the supreme court will reverse for error committed during the progress of a trial and duly excepted to, although the same may not have been brought to the attention of the court by a motion for a new trial. *Prince v. Cole*, 486.
41. The courts should not, in instructions to a jury, take for granted facts in issue in the cause. *Chouquette v. Barada*, 491.
42. Where a deed, purporting to be the deed of a corporation, is admitted, and no objection is made to its introduction on the ground that the corporate seal has not been proved, this objection will not be entertained in the supreme court. *Id.*
43. Courts should not in instructions comment on the evidence; it is the province of the jury to draw inferences from the facts in evidence; the courts should not give undue importance to particular facts in evidence by telling the juries that they are authorized to draw certain specified inferences from them. *Id.*
44. If a plaintiff voluntarily suffers a nonsuit before the court has made any ruling prejudicial to him, the supreme court will not interfere. *Sone v. Palmer*, 539.

PRACTICE—(Continued.)

45. A special adjourned session of a court, although it may with propriety be said to be a continuance of the regular term, since its object is the completion of the business of the regular term, is a separate and distinct term of the court. Should such a special adjourned term be appointed and a cause be continued thereat at the cost of the party applying for such continuance, this order, properly construed, would embrace the costs of such adjourned term only and not those of the previous regular term. *Dulle v. Deimler*, 583.
46. Should the clerk in such case, in issuing execution for costs, include the costs of the regular term, the court may at a subsequent term order a retaxation of the costs. *Id.*
47. A defendant can not introduce evidence to support a defence not set up in his answer. If the evidence discloses a defence not set up in the answer, the court may, in furtherance of justice and on such terms as may be fit, allow the defendant to amend his pleading so as to make it conform to the facts in proof, provided the amendment does not substantially change the defence. *Irwin v. Chiles*, 576.
48. In a suit upon a promissory note, if the defendant be personally served with process, he must answer the petition on or before the second day of the term at which he is bound to appear. (R. C. 1855, p. 1235, § 24.) This rule applies where an attachment is sued out in aid of such suit, in case there has been service of the writ of attachment in time for judgment at such term. *Farrington v. McDonald*, 581.
49. At the May term, 1857, of the Caldwell county court an account was presented for allowance against the county. The account was disallowed. At the March term, 1858, by leave of court, testimony touching the same account was introduced. The court having heard the testimony, "adhered to its former decision." An appeal was then taken to the circuit court. *Held*, that the appeal was well taken; that the rejection of the claim at the May term, 1857, was not like a judgment in a suit between individuals which the court could not open at a subsequent term; that the county court could waive an advantage the county might have. *Boggs v. Caldwell County*, 586.
50. In a statutory proceeding to contest the validity of a will, the burden of proof rests upon the defendants; consequently they have the right to open and close the case to the jury. *Cravens v. Falconer*, 19.
51. Should a testator, by reason of a failure to name or provide for some of his children in his will, be deemed in law to have died intestate as to those not named, they can not maintain against the devisees an action for the partition of the property embraced in the devise; resort must be had to a petition for contribution, in which the equities arising out of advancements may be adjusted. *Hill v. Martin*, 78.
52. The supreme court will not review the verdicts of juries on the ground that they are against the weight of evidence. *Backster v. Hall*, 593.

PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

See EVIDENCE, 1. CRIMES AND PUNISHMENTS.

1. A justice of a county court is not authorized to let to bail a person in-

PRACTICE AND PROCEEDINGS IN CRIMINAL CASES—(*Continued.*)

- dicted for a bailable offence unless the indictment is pending in his county. *State v. Nelson*, 13.
2. A. was indicted for stealing certain cattle alleged in the indictment to be the property of B. At the trial, one C., who had been summoned as a juror, stated, upon his *voir dire*, that he knew the cattle alleged to have been stolen; that his brother had once owned them, and had sold them to one K., who had sold them to B. *Held*—the allegation as to B.'s ownership not being controverted on the trial—that C. was a competent juror. *State v. Martin*, 530.
 3. The St. Louis criminal court has power, of its own motion, to order a removal of a cause to the St. Louis circuit court on the ground that the judge of the said criminal court has been of counsel for the defendant; the local act of December 11, 1855, (R. C. 1855, p. 1591,) is confined to changes of venue made upon the application of the defendant. *State v. Houser*, 232.
 4. A general verdict against a defendant in a criminal case will authorize a judgment thereon if there is a single good count in the indictment. *State v. Montgomery*, 594.
 5. It is competent in a criminal case, as affecting the credibility of a witness, to inquire into the state of his feelings towards the party against whom he is called upon to testify; this inquiry can not, however, be made concerning the witness' feeling towards the husband of such party. *Id.*

PRE-EMPTION.

See LANDS AND LAND TITLES, 7.

PRESUMPTIONS.

See EVIDENCE. WILLS AND TESTAMENTS.

PRINCIPAL AND AGENT.

See BOATS AND VESSELS.

1. A. was appointed attorney for a bank for a term of two years. His compensation as such attorney was three per cent. upon all collections made by him in the county in which the bank was located, and five per cent. upon all collections made out of said county. During his term of office, he obtained judgment in favor of the bank upon a claim deposited in his hand for collection. *Held*, that he was entitled to his three per cent. commission on the amount recovered, whether he received the money on the judgment during his term of office or not. *State, to use, &c., v. Hawkins*, 366.
2. An attorney of record in a cause is authorized to receive payment of a judgment recovered therein. Those dealing with such an attorney will not be affected by any arrangements entered into by him with his client, or by a revocation of his authority of which they have no notice. *Id.*
3. The master of a steamboat has no authority, as master, to bind the boat or its owners by a promissory note. *Gregg v. Robbins*, 347.
4. The inspector of the fire department of the city of St. Louis had power,

PRINCIPAL AND AGENT—(*Continued.*)

- under the thirteenth section of the ordinance establishing and regulating the fire department, approved April 5, 1856, (Rev. Ord. 434,) to order and contract for repairs of engine houses, where the repairs ordered amounted to more than fifty dollars; a contract for repairs made by him as inspector, though not made in the name of the city of St. Louis, would be binding upon her. *Robinson v. City of St. Louis*, 488.
5. Where a party relies upon an instrument purporting to have been executed by an agent, he must prove the agent's authority. *Sone v. Palmer*, 539.
 6. Where a mature negotiable promissory note is delivered by the payee without endorsement to an agent for collection, the possession of the note by the latter will not raise a presumption that he has authority to assign the same; the burden of proving an assignment by authority of the payee rests upon the party claiming under such alleged assignment. *Hardesty v. Newby*, 567.
 7. An agent has discharged his duty when he pays over to his principal money collected by him as agent; it is no concern of his whether his principal's title thereto is good or bad. *Witman v. Felton*, 601.
 8. Where, in an action by a principal against an agent to recover money alleged to have been collected by him as agent, there is evidence showing that the defendant did collect the money as agent for the plaintiff, this evidence can not be refuted by showing that the title of the plaintiff to such money is bad as against third persons. *Id.*

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

R

RAILROADS.

1. Whatever may be the nature of the title acquired by the state of Missouri by virtue of the act of Congress of June 10, 1852, granting lands in aid of the construction of certain railroads—whether the state acquired the fee simple title to the lands clothed with a political trust for the execution of which the faith of the state was pledged by the acceptance of the grant, or whether the act of Congress created an estate upon condition subsequent—a mere trespasser can not defend against a grantee of the state by invoking a supposed right of the United States to enter for condition broken. *Kennett v. Plummer*, 142.
2. The charter of the St. Louis and Iron Mountain Railroad Company did not confer upon a justice of the peace jurisdiction of an action against the company to recover damages for injuries sustained by reason of the construction of a culvert. *Fatchel v. St. Louis & Iron Mountain Railroad Co.*, 178.
8. Justices of the peace have jurisdiction of actions brought against railroad corporations under the twelfth section of the general railroad act. (R. C. 1855, p. 414.) *Mooney v. Hannibal & St. Joseph Railroad Co.*, 570.

RECOGNIZANCE.

1. A justice of a county court is not authorized to let to bail a person indicted for a bailable offence unless the indictment is pending in his county. *State v. Nelson*, 13.

RECORD.

See ESTOPPEL.

REDEMPTION OF LAND SOLD FOR TAXES.

See REVENUE.

REFERENCE.

See PRACTICE, 34, 35.

REPLEVIN.

See CLAIM AND DELIVERY OF PERSONAL PROPERTY.

RES ADJUDICATA.

See JUDGMENTS OF SISTER STATES. CONFLICT OF LAWS.

RESULTING TRUSTS.

1. Resulting trusts are not within the statute of frauds. *Cason v. Cason*, 47; *Morris v. Morris*, 114; *Cloud v. Ivie*, 578.
2. A resulting trust arises by operation of law where the purchase money of real estate is paid by one person and the legal title is transferred to another. The relation of trustee and *cestui que trust* in such cases must result from the facts as they exist at the time of or anterior to the purchase, and can not be created by subsequent occurrences. *Kelly v. Johnson*, 249.
3. It is not essential to the creation of a resulting trust that the money advanced should come directly from the *cestui que trust*; it is sufficient if it satisfactorily appear that the person supplying it intends it as a gift or loan to such *cestui que trust*. *Id.*
4. Where two proprietors of land agree that one of them shall enter under the graduation law of Congress an adjoining tract of government land, each furnishing one-half the sum required to pay the graduation price, and that the one who enters shall convey one-half the tract to the other, and the entry is made under this agreement; *held*, that there will be a resulting trust as to one-half of the land entered. *Cloud v. Ivie*, 578.

REVENUE.

See FEES.

1. The provisions of the act of February 13, 1847, (Sess. Acts, 1847, p. 122, § 31, 32, incorporated into the revised code of 1855, R. C. 1855, p. 1360, § 35, 36,) in so far as they regulate the redemption by minors of land sold for taxes, are complete in themselves and do not need the aid of the act of 1845. (R. C. 1845, p. 951, § 14.) *Stewart v. Brooks*, 62.
2. To entitle a minor to redeem lands sold for taxes, as provided by sections 31 and 32 of the act of February 13, 1847, and by sections 35 and 36 of the revenue act of December 13, 1855, he must pay to the pur-

REVENUE—(*Continued.*)

chaser at the tax sale double the amount of all the taxes and costs paid by him at the time of his purchase, together with fifteen per cent. per annum upon this amount from the date of the tax deed; he shall also refund to the purchaser the amount of taxes paid by him after the date of his purchase, together with interest thereon at the rate of six per cent. per annum from the times of payment respectively, whether before or after the date of the tax deed. *Id.*

ROADS AND HIGHWAYS.

1. Under the general law concerning roads and highways, (R.C. 1855, p. 1390, § 20,) only those persons who own land through which the route of a state road is located and who consider themselves aggrieved by the assessment of the commissioners can object in the county court to the approval of the report of the commissioners locating the road. *Bernard v. Callaway County Court*, 37.
2. Parties aggrieved by the location of a state road have a right of appeal to the circuit court. Since, however, there is no provision authorizing the signing of bills of exceptions in such cases, the circuit court must affirm or reverse on the record alone. *Id.*

RULE IN SHELLEY'S CASE.

See WILLS AND TESTAMENTS, 4, 5.

S

ST. LOUIS.

See CITY OF ST. LOUIS.

SALES.

See VENDORS AND PURCHASERS. SHERIFF.

SATISFACTION.

See ACCORD.

SEATS OF JUSTICE.

1. Granting that an appeal would lie from the judgment of a county court in a proceeding instituted to obtain a removal of the seat of justice, it would only lie in the case of a final judgment. *Woods v. Phelps County Court*, 119.
2. Neither under the general act regulating the removal of seats of justice (R. C. 1855, p. 513), nor under the act organizing Phelps county (Sess. Acts, 1857, Adj. Sess. p. 397) would an appeal lie to the circuit court from an order of the county court sustaining or overruling a motion to set aside or vacate a former order of the county court approving the location of the seat of justice. *Id.*
3. Where a public act requiring the exercise of judgment is to be performed by several commissioners appointed in a statute, all of them must meet and confer. *Id.*
4. Though a majority of the commissioners appointed by the act organizing Phelps county (Sess. Acts, 1857, Adj. Sess. p. 397) may make a

SEATS OF JUSTICE—(Continued.)

location of a seat of justice, yet all the commissioners appointed must meet and confer with respect to such location. *Id.*

SECURITY FOR COSTS.

1. Where the plaintiff in a suit gives security for costs and the defendant prevails in the action, judgment may be rendered at the same time against the surety; should however judgment for costs against the surety be omitted, the defendant may sue the surety directly on his undertaking. *Davis v. Farmer*, 54.
2. The plaintiff in a suit gave security for costs by an instrument in the following form: "I. S. v. N. A. D. Civil action. We, I. S. as principal, and W. B. F. and B. S. L. as sureties, are held and firmly bound for the payment of all the costs that have accrued or may accrue in the above case. Witness our," &c. *Held*, judgment having been rendered against the plaintiff for costs, that suit might be maintained on this instrument by the defendant against the sureties. *Id.*

SESSION.

See COSTS. COURT.

SET-OFF.

1. The third section of the act of 1855 concerning bonds, notes and accounts (R. C. 1855, p. 322), allowing the obligor or maker of a non-negotiable promissory note every just set-off against the assignor existing at the time of the assignment unless it is expressed in the note that it is "for value received, negotiable and payable without defalcation," is not applicable to notes executed before the revised code of 1855 went into effect and made payable "without defalcation or discount," although assigned after said code went into effect. *Paston v. Bussmeyer*, 330.

SHERIFF.

See EXECUTION. ATTACHMENT. ELECTION.

1. Where, in St. Louis county, a levy of an execution or attachment is made upon personal property, a person other than the defendant in such execution or attachment, claiming the property so levied on, has a choice of remedies. He may make claim to the property in accordance with the third section of the local act of March 3, 1855, (Sess. Acts, 1855, p. 464); in which case, if the sheriff or other officer demands and receives a *sufficient* indemnification bond from the plaintiff in the execution or attachment, the claimant will have no remedy against the officer but must resort to a suit on the indemnification bond. Should the claimant, however, not make claim in the manner provided in said section, he may maintain an action against the sheriff or other officer for the possession of the property levied on. *Bradley v. Holloway*, 150.
2. A sheriff or other officer levying an execution or attachment is not authorized, under said act of March 3, 1855, to demand an indemnification bond of the plaintiff in the execution or attachment unless claim

SHERIFF—(Continued.)

is made to the property levied on substantially as provided in the third section of said act. *Id.*

3. Where a sheriff in St. Louis county levies an execution upon personal property, a third person claiming the same may maintain an action against the sheriff for its possession without making claim thereto in accordance with the third section of the local act of March 3, 1855. (Sess. Acts, 1855, p. 464.) *St. Louis, Alton & Chicago Railroad Co. v. Castello*, 379.
4. A sheriff, under an execution against A., levied upon a lot of gold and silver and copper coins and paper currency belonging to B.; B., with a view to facilitate the institution of a suit by himself to test his title, substituted, in the hands of the sheriff, for the property levied on, bank bills of large denomination, the exchange being made by him and the sheriff under the understanding that suit would be brought by B. for the possession of the bank bills thus substituted. *Held*, that B. might, under such circumstances, maintain an action against the sheriff for the possession of the bank bills. *Id.*
5. Where a sheriff receives a writ of execution and does not levy the same during his term of office, it is his duty, at the expiration of his term, to deliver said writ to his successor in office, whose duty it is to receive and execute the same. *Dunnica v. Coy*, 525.

SHERIFF'S SALES.

See EXECUTION.

1. When the defendant in an execution is not a resident of the county in which the land sought to be sold is situated, the plaintiff in the execution should give notice to the defendant of the issuing of the same as required by section 46 of the act regulating executions. (R. C. 1855, p. 766, § 46.) Should no such notice be given, and property be levied on and sold under the execution, the defendant may on the return day of the execution move the court to set aside such sale, and the court should set aside the same although the sheriff may have executed the deed to the purchaser before the return day of the execution. *Ray v. Stobbs*, 35.
2. If a levy of an execution be made upon property not belonging to the defendant therein and such execution returned satisfied to the amount made by the execution sale, should the plaintiff in the execution be compelled to refund to the true owner the amount received by him from such sale, he will be entitled to have the satisfaction endorsed on the execution set aside and to have an execution issue for the full amount of the judgment. *Magwire v. Marks*, 193.
3. A. recovered a judgment against B. Execution was issued thereon and levied by order of A.—he giving the plaintiff an indemnification bond—on certain personal property in possession of B. but known by A. to be claimed by C. as trustee for the wife of B. The sheriff made sale of the property levied on, and the amount made was endorsed on the execution in *pro tanto* satisfaction thereof. C. sued the sheriff and recovered judgment against him for the amount made by said levy

SHERIFF'S SALES—(*Continued.*)

and sale, with interest, which was paid by A. *Held*, that A. was entitled to have the sheriff's return vacated and set aside so far as it stated a partial satisfaction of the execution, to have the same amended in accordance with the facts, and to have an execution issue for the whole amount of the judgment. *Id.*

SHIPPING.

See BOATS AND VESSELS.

SLANDER.

1. Where the slanderous words charged in a petition are not actionable in themselves, it is necessary to set forth, by way of inducement, those extrinsic facts and circumstances which make them actionable. *McManus v. Jackson*, 56.
2. It is not actionable to charge a person with swearing a lie unless it is shown by proper averments that the plaintiff was sworn as a witness in a judicial proceeding, and that the speaking of the offensive words had reference to such proceeding. *Id.*
3. It is not actionable to charge a person with giving a free pass to a negro, unless it be averred that the negro referred to was a slave; nor, if it be averred that the negro referred to was a slave, would such words be actionable unless it be also averred that the negro did not belong to plaintiff. *Id.*

SLAVERY.

1. When a slave is cruelly or inhumanly abused by a person who does not have such slave in his employment or under his charge, power or control, resort can not be had, in the punishment of such an offence, to an indictment founded on the forty-eighth section of the eighth article of the act concerning crimes and punishments. (R. C. 1855, p. 634.) *State v. Peters*, 241.
2. A. bequeathed a female slave with other property to his daughter B., and directed that all the property, real and personal, should be placed in the hands of C. for the use and benefit of said B. In a codicil to this will, duly executed, there was the following provision: "It is further my will that the negro girl Eliza, that I have bequeathed to my daughter B., shall have the privilege to choose some person to buy her in case she [shall] not be satisfied to live with my daughter B." The said slave communicated to the said C. her unwillingness to live with B. and made choice of a master, and C. sold her to the person thus chosen. *Held*, that the purchaser acquired a good title. *Beaupied v. Jennings*, 254.
3. A privilege, conferred by will upon a slave, of choosing some person to buy her in case she should not be satisfied to live with the person to whom she had been bequeathed, is not, it seems, inconsistent with the legal idea of slavery. *Id.*

SPECIFIC PERFORMANCE.

See STATUTE OF FRAUDS.

STATUTE OF FRAUDS.

See LANDLORD AND TENANT, 5. RESULTING TRUSTS.

1. Resulting trusts are not within the statute of frauds. *Cason v. Cason*, 47; *Morris v. Morris*, 114; *Cloud v. Ivie*, 578.
2. Where there is a parol sale of real estate and the vendee is placed by the vendor in such a situation that a fraud will be worked upon him unless the contract of sale is fully performed, this will be deemed such a part performance as will take the case out of the statute of frauds. *Dickerson v. Chrisman*, 134.
3. Justices of the peace can not specifically enforce a parol contract concerning land on the ground that it has been taken out of the statute of frauds by part performance. *Ridgley v. Sillwell*, 400.
4. A. let certain premises to B. for a term of years; the letting, being by parol, had the force and effect at law of a tenancy from year to year. A. gave B. due notice to quit, and brought his action of forcible detainer before a justice of the peace. B. relied for a defence upon the fact that he had entered upon said premises under a parol lease for ten years, while the building thereon was not completed, and had made improvements thereon, and had paid rent under said parol agreement. *Held*, that the justice of the peace had no jurisdiction to enforce the equities arising out of such a defence, and that, if the defendant was entitled to the specific enforcement of the parol agreement, he might have enjoined in a court of competent jurisdiction the proceedings before the justice until his equity could be determined. *Id.*
5. Where land owned by A. is in the adverse possession of B., and B. dies before the time of limitation is complete, devising his estate to his widow, but not naming or providing for his children in his will, and the widow remains in possession, not claiming under the will, but under an understanding with the children that she should enjoy the estate for life and that at her death it should go to them, and while she so remains in possession the time of limitation becomes complete and the widow's interest is levied on under a judgment against her and sold and she dies; *held*, that the agreement of the widow with the children would be valid though by parol, it not being within the statute of frauds; that the purchaser would take subject to such agreement, whether he had notice of it or not. *Chouquette v. Barada*.
6. Where two proprietors of land agree that one of them shall enter under the graduation law of Congress an adjoining tract of government land, each furnishing one-half the sum required to pay the graduation price, and that the one who enters shall convey one-half the tract to the other, and the entry is made under this agreement; *held*, that there will be a resulting trust as to one-half of the land entered. *Cloud v. Ivie*, 578.
7. A parol agreement respecting the sale of land, of which there has been part performance, is not within the statute of frauds. *Young v. Montgomery*, 604.

STATUTES—CONSTRUED AND NOTICED.

Arbitrations and References. (R. C. 1855, p. 193.) *Hamlin v. Duke*, 166.
Attachment. (R. C. 1855, art. 1, § 1.) *Reed v. Pelletier*, 173. (Art. 1,

STATUTES—CONSTRUED AND NOTICED—(Continued.)

- § 26.) *McAllister v. Pennsylvania Ins. Co.*, 214; *McAllister v. Commonwealth Ins. Co.*, 214. (Art. 1, § 9.) *Wood v. Squires*, 528. See *Tucker v. Frederick*, 574.
- Boats and Vessels.* (R. C. 1855, p. 30, § 1.) *Lancaster v. Woodboat Har- din*, 351. See, generally, *Gregg v. Robbins*, 347; *Hight v. Robbins*, 168.
- Boggs, Wilber F.*—Act for relief of. (Sess. Acts, 1857, p. 746.) *Boggs v. Caldwell County*, 586.
- Bonds, Notes and Accounts.* (R. C. 1855, p. 322, § 3.) *Paston v. Buss- meyer*, 330.
- Boonville*—Charter and acts amendatory thereof. (Sess. Acts, 1839, p. 297, § 11, 28; Sess. Acts, 1847, p. 183, § 3; Sess. Acts, 1841, p. 306.) *Wil- lis v. Boonville*, 543.
- Carondelet*—Act of incorporation. (Sess. Acts 1851, p. 139.) *Bowlin v. Fur- man*, 427.
- Change of Venue.* Local act. (R. C. 1855, p. 1591, Appendix; *Id.* p. 539.) *State v. Houser*, 233.
- Confirmations.* (Act of Congress of May 26, 1824.) *Williams v. Carpen- ter*, 453. (Act of Congress of April 29, 1816.) *St. Louis University v. McCune*, 481. (Act of Congress of July 9, 1832, and of March 2, 1833.) *O'Brien v. Perry*, 500. (Act of Congress of June 13, 1812.) *Milburn v. Hardy*, 514. See *Bowlin v. Furman*, 427; *Kennett v. Plummer*, 142; *Climmer v. Wallace*, 556.
- Conveyances.* (R. C. 1845, § 7.) *Cravens v. Faulconer*, 19. (R. C. 1825, § 12.) *Garnier v. Barry*, 438. (R. C. 1855, § 35.) *West v. Best*, 551. See *Garnier v. Barry*, 438.
- Costs.* (R. C. 1855, p. 441, art. 1, § 2.) *Davis v. Farmer*, 54.
- Counties*—Removal of seats of justice. (R. C. 1855, p. 513; Sess. Acts, 1857, Adj. Sess. p. 397.) *Wood v. Phelps County Court*, 119.
- Courts.* (R. C. 1855, p. 530, 540, § 48.) *Dulle v. Deimber*, 583.
- Crimes and Punishments.* (R. C. 1855, art. 8, § 8.) *State v. Gardner*, 90. (Art. 8, § 48.) *State v. Peters*, 634. See *State v. Houser*, 232; *State v. Martin*, 530; *State v. Mitchell*, 562; *State v. Wells*, 565; *State v. Welch*, 600.
- Divorce*—Act divorcing J. W. Honey and wife. (Sess. Acts, 1816, p. 80.) *Chouteau v. Magen*, 187.
- Dower.* (R. C. 1845, p. 430, § 3.) *Cason v. Cason*, 47; *Welch v. Ander- son*, 293. (R. C. 1855, p. 668, § 1.) *Watson v. Watson*, 300.
- Dram-shops.* (R. C. 1855, p. 682; R. C. 1845, p. 542, § 3.) *State v. An- drews*, 14, 17; *State v. Mitchell*, 562; *State v. Wells*, 565.
- Elections.* (R. C. 1855.) *Castello v. St. Louis Circuit Court*, 259.
- Evidence.* (R. C. 1855, p. 733, § 58.) *Garnier v. Barry*, 438.
- Executions.* (R. C. 1855, p. 746, § 46.) *Ray v. Stobbs*, 35. (R. C. 1845, § 52.) *Dunnica v. Coy*, 525.
- Forcible Entry and Detainer.* (R. C. 1855, p. 786.) *Young v. Smith*, 65.
- Frauds and Perjuries.* (R. C. 1855, p. 806.) *Ridgley v. Stillwell*, 400;

STATUTES, CONSTRUED AND NOTICED—(Continued.)

- Chouquette v. Barada*, 491; *Cloud v. Ivie*, 578; *Young v. Montgomery*, 604.
- Fraudulent Conveyances.* (R. C. 1855, p. 801.) *Reed v. Pelletier*, 173; *Miller v. Bascom*, 352; *Hall v. Webb*, 408; *Gutzweiler v. Lachman*, 434. (Act of December 6, 1821, 1 Terr. Laws.) *Garnier v. Barry*, 438. (R. C. 1855.) *Dunnica v. Coy*, 525; *Billingley's Adm'r v. Bunce*, 547.
- Insurance Agencies.* (R. C. 1855, p. 884.) *McAllister v. Pennsylvania Insurance Co.*, 214; *McAllister v. Commonwealth Ins. Co.*, 214.
- Justices' Courts.* (R. C. 1855, p. 924, 967, art. 8, § 20.) *Magwire v. Marks*, 193.
- Kansas City Court of Common Pleas.* (Sess. Acts, 1855, Adj. Sess. p. 60.) *Ashburn v. Ayres*, 75; *Boggs v. Caldwell County*, 586; *Platt v. Smith*, 593.
- Landlord and Tenants.* (R. C. 1855, p. 1017, § 33, 34.) *Hunt v. Cobb*, 198.
- Law Commissioner's Court of St. Louis County.* (R. C. 1855, p. 1596, Appendix.) *Annis v. Bigney*, 247.
- Married Women's Real Estate.* (Act of June 22, 1821, 1 Terr. Laws, 756.) *Garnier v. Barry*, 438.
- Mechanics' Lien.* Local act. (Sess. Acts, 1857, p. 668.) *McPheeters v. Merimac Bridge Co.*, 465.
- Merchants' Licenses.* (R. C. 1855, p. 1072.) *The State v. Andrews*, 14; *State v. Mitchell*, 562; *State v. Wells*, 565.
- Merimac Bridge Co.*—Charter of. (Sess. Acts, 1853, p. 195.) *McPheeters v. Merimac Bridge Co.*, 465.
- Mills and Millers.* (R. C. 1855, p. 1073.) *Willoughby v. Shipman*, 50.
- Pacific Railroad.* (Act of December 25, 1852; Sess. Acts, 1853, p. 10.) *Kennett v. Plummer*, 142.
- Partition.* (R. C. 1845, p. 764.) *Waugh v. Blumenthal*, 462.
- Practice Act.* (R. C. 1855, art. 6, § 10; art. 9, § 19.) *Welch v. Bryan*, 30. (Art. 12, § 22.) *Bryan v. Miller*, 32. (Art. 9, § 13.) *Basye v. Ambrose*, 39. (Art. 4.) *Keyte v. Plemmons*, 104. (Art. 10, § 12, 13.) *Morris v. Morris*, 114; *Bray v. Thatcher*, 129; *Conran v. Sellew*, 320. (Art. 2, § 1, 2.) *Bock v. Nuella*, 180. (Art. 6, § 10.) *Syme v. Steamboat Indiana*, 335. (Art. 7, § 11.) *Hohenthal v. Watson*, 360. (Art. 7.) *St. Louis, Alton & Chicago Railroad Co. v. Castello*, 379. (Art. 9, § 3.) *Irwin v. Chiles*, 576. (Art. 6, § 24.) *Farrington v. McDonald*, 581. (Art. 10, § 6.) *Dulle v. Deimler*, 583.
- Practice and Proceedings in Criminal Cases.* (R. C. 1855, p. 1178, art. 4, § 33, 34, 35.) *State v. Nelson*, 13. See *State v. Montgomery*, 594.
- Railroad Corporations.* (R. C. 1855, p. 430, § 38, 51.) *Fatchell v. St. Louis & Iron Mountain Railroad Co.*, 178; *Mooney v. Hannibal & St. Joseph Railroad Co.*, 570.
- Revenue.* (Sess. Acts, 1857, Adj. Sess. p. 75.) *State v. Welch*, 600; *Harris*



STATUTES, CONSTRUED AND NOTICED—(Continued.)

v. Buffington, 53. (Sess. Acts, 1847, p. 117; R. C. 1855, p. 1360, § 35, 36.) Stewart v. Brooks, 62.)

Roads and Highways. (R. C. 1855, art. 2, § 20.) Bernard v. Callaway County Court, 37.

St. Louis & Iron Mountain Railroad Co.—Charter of. (Sess. Acts, 1851, p. 479.) Fatchell v. St. Louis & Iron Mountain Railroad Co. 178.

Sheriff and Marshal—Act St. Louis county. (Sess. Acts, p. 464.) Bradley v. Holloway, 150; St. Louis, Alton & Chicago Railroad Company v. Castello, 379.

Trespass. (R. C. 1845, p. 1068.) Brewster v. Link, 147.

Wills. (R. C. 1855, p. 1565, § 4, 17, 18, 30.) Cravens v. Faulconer, 19. (R. C. 1825, § 18.) Cravens v. Faulconer, 19. (R. C. 1835, p. 630, § 30.) Hill v. Martin, 78. (R. C. 1825, p. 795, § 20.) Chouquette v. Barada, 491.

SUBMISSION.

See ARBITRATION.

SURVEY.

See LANDS AND LAND TITLES.

T

TAXES.

See REVENUE.

TAXABLE PROPERTY.

1. In an indictment founded on the fifteenth section of the second article of the revenue act of 1857, (Sess. Acts, 1857, Adj. Sess. p. 79,) for delivering to the assessor a false and fraudulent list of taxable property, it must appear in what respect the list delivered is false and fraudulent; the indictment must set out, in terms of general description at least, the taxable property owned by the defendant and fraudulently omitted in the list delivered. *State v. Welch*, 600.

TERMS OF COURT.

See COSTS. COURT.

TERRITORIAL LEGISLATURE.

See DIVORCE, 3.

TRESPASS.

1. In actions founded on the "act to prevent certain trespasses," (R. C. 1845, p. 1068,) the jury can assess single damages only; the jury should assess the value of the property taken or injured; the court will then, if a proper case be made out, give judgment for treble the amount so assessed. *Brewster v. Link*, 147.
2. The question of "probable cause" is in such cases to be determined by the court. *Id.*

TRESPASS—(Continued.)

3. Where the petition contains counts under the statute and at common law, and the jury render a general verdict, the court is not authorized to treble the damages. *Id.*

TRIALS BY THE COURT.

1. Where a plaintiff seeks relief other than the recovery of money only or of specific real or personal property—as where the annulment of deeds is sought on the ground that they were obtained by duress and violence—the cause must be tried by the court and not by the jury. *Bray v. Thatcher*, 129.
2. The issues of fact in an action brought to obtain the surrender and cancellation of a promissory note must be tried by the court, unless the court takes the opinion of a jury upon some specific question of fact involved therein, by an issue made up for that purpose. (R. C. 1855, p. 1261, § 13.) *Conran v. Sellev*, 320.
2. Where the trial must be by the court, instructions or declarations of law in the form of instructions are not required, and if given will not be reviewed or noticed by the supreme court. *Id.*

TRUSTS.

See EQUITY. FRAUD AND FRAUDULENT CONVEYANCES. RESULTING TRUSTS.

V

VENDORS AND PURCHASERS.

See CONVEYANCE.

1. In order that fraudulent representations made by a vendor to a vendee with respect to the character of the improvements upon the land sold may be the basis of relief to the purchaser in an action by the vendor on a promissory note given for a portion of the purchase money, it must appear that the misrepresentations were made with respect to something material and constituting an inducement to the contract. *Hodges v. Torrey*, 99.
2. Declarations of a grantor of real estate, made before the grant, to the effect that he had previously sold said real estate to another, are admissible in evidence against such grantee and all persons claiming under him. *Dickerson v. Chrisman*, 134.
3. Where there is a parol sale of real estate, and the vendee is placed by the vendor in such a situation that a fraud will be worked upon him unless the contract of sale is fully performed, this will be deemed such a part performance as will take the case out of the statute of frauds. *Id.*
4. A. conveyed to B. a slave in trust to secure and indemnify the latter against loss by reason of his being security for A. B. acting under a power in the deed of trust sold said slave to C., taking a bond to himself “as trustee of A.” for a portion of the purchase money. The slave was afterwards taken from the possession of C. by the true owner

VENDORS AND PURCHASERS—(Continued.)

- from whom A. had stolen him. *Held*, that there was a failure of consideration of the bond, and payment thereof could not be enforced against C. *Long v. Gilliam*, 560.
5. A parol agreement respecting the sale of land, of which there has been part performance, is not within the statute of frauds. *Young v. Montgomery*, 604.

W

WAIVER.

See JUSTICES' COURTS, 5. BILLS OF EXCHANGE AND PROMISSORY NOTES, 11.

WILLS AND TESTAMENTS.

1. It is not necessary, in order to give validity to a will, that the testator should actually sign the same in the presence of the attesting witnesses. *Cravens v. Faulconer*, 19.
2. The attesting witnesses must subscribe their names to the will in the presence of the testator; but it is not necessary that they should subscribe in the presence of each other. *Id.*
3. In a statutory proceeding to contest the validity of a will, the burden of proof rests upon the defendants; consequently they have the right to open and close the case to the jury. *Id.*
4. In the year 1842, a testatrix, domiciled in the state of Kentucky, died there. By her will she made the following bequest: "I give and bequeath to my daughter, Margaret Dean, a negro girl named Hannah, for to be at her disposal during her natural life, then to go to the benefit of her heirs." *Held*, that the daughter took an estate for life only, with remainder to her heirs, who would take under the will by purchase. *Riggins v. McClellan*, 23.
5. The rule in *Shelly's* case was not in force as law in the state of Kentucky in 1842 at the death of the testatrix. *Id.*
6. A. bequeathed a female slave with other property to his daughter B., and directed that all the property, real and personal, should be placed in the hands of C. for the use and benefit of said B. In a codicil to this will, duly executed, there was the following provision: "It is further my will that the negro girl Eliza, that I have bequeathed to my daughter B., shall have the privilege to choose some person to buy her in case she [shall] not be satisfied to live with my daughter B." The said slave communicated to the said C. her unwillingness to live with B. and made choice of a master, and C. sold her to the person thus chosen. *Held*, that the purchaser acquired a good title. *Beaupied v. Jennings*, 254.
7. A privilege, conferred by will upon a slave, of choosing some person to buy her in case she should not be satisfied to live with the person to whom she had been bequeathed, is not, it seems, inconsistent with the legal idea of slavery. *Id.*

WILLS AND TESTAMENTS—(*Continued.*)

8. A will not providing for children of the testator, though voidable under section twenty of the act concerning wills and testaments, (R. C. 1825, p. 795,) by such children, is good as against strangers; unless the children assert their right against the will, the title will remain in the devisee, who will have, however, a defeasible title. *Chouquette v. Barada*, 491.
9. Where land owned by A. is in the adverse possession of B., and B. dies before the time of limitation is complete, devising his estate to his widow, but not naming or providing for his children in his will, and the widow remains in possession, not claiming under the will, but under an understanding with the children that she should enjoy the estate for life and that at her death it should go to them, and while she so remains in possession the time of limitation becomes complete and the widow's interest is levied on under a judgment against her and sold and she dies; *held*, that the agreement of the widow with the children would be valid though by parol, it not being within the statute of frauds; that the purchaser would take subject to such agreement, whether he had notice of it or not. *Id.*

WITNESS.

See EVIDENCE.

1. In a suit against a corporation, a stockholder thereof is a competent witness in behalf of the corporation. (*Barclay v. Globe Mutual Insurance Co.* 26 Mo. 490, affirmed.) *Bredow v. Mutual Savings Institution*, 181.
2. To render an assignment of a patent right or of an undivided part thereof valid, it is not necessary that it should be recorded in the United States patent office; the assignee will have a vendible interest without such record. *Sone v. Palmer*, 539.